Supreme Court, U.S.
FILED

091568 JUN 22 2010

OFFICE OF THE CLERK

No. 10-

In the
Supreme Court of the United States

JIANNA MOORE, *et al.*,
Petitioners,

v.

LAKE COUNTY DEPARTMENT OF JOB AND FAMILY SERVICES, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

BRIAN L. SUMMERS
Counsel of Record
7327 CENTER STREET
MENTOR, OHIO 44060
(440) 255-4100
summerslawfirm@aol.com

Attorney for Petitioners

June 22, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED FOR REVIEW

I. Whether the appropriate standard of culpability is professional judgment for determining whether a State has violated the Fourteenth Amendment substantive due process rights of a foster child when such child is tortiously injured after having been deprived of his or her liberty interest by being involuntarily taken into the custody and care of the State.

II. Whether, to guarantee a foster child's substantive due process right to be free from an unreasonable risk of harm and to reasonable safety while in foster care, the State should be held liable when its care, treatment, and services substantially depart from accepted learned judgment, standards, or practices.

RULE 14.1(b) LIST OF PARTIES TO THE PROCEEDING

Petitioners are Jianna Moore, Danielle Moore, and Frederick Waterwash.

Respondents are Lake County Department of Job and Family Services, Matthew Battiato, Art Iacofano, Teresa Palm, Melanie Hale, Roberta Barb, Erin Whipple, Melissa Flick, Emily Hazel, and Jaime Lette.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, petitioners, Jianna Moore, Danielle Moore, and Frederick Waterwash, make the following disclosure: said parties are private individuals and are not a subsidiary or affiliate of a publicly owned corporation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

RULE 14.1(b) LIST OF PARTIES TO THE PROCEEDING ii

RULE 29.6 CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR ALLOWANCE OF THE WRIT .. 5

I. SUBSTANTIVE DUE PROCESS IN THE FOSTER CARE CONTEXT 6

A. A State's Fourteenth Amendment Duty to Protect Foster Children 6

B. The Scope of the Constitutional Duty to Protect Foster Children and the Required Standard of Care 11

C. Federal Court and State Supreme Court Jurisprudence 17

D. Sixth Circuit Case Law 27

II. ARGUMENTS IN SUPPORT OF THE PROFESSIONAL JUDGMENT STANDARD 30

A. Foster Children are More Akin to the Mentally Retarded, not Prisoners 30

B. Deliberate Indifference Encourages Public Officials to Ignore Danger 32

C. The Professional Judgment Standard is Tailored to the Foster Care Context ... 32

D. Public Policy Considerations 34

CONCLUSION 35

APPENDIX

App. A: Sixth Circuit Opinion (Feb. 2, 2010) 1a

App. B: District Court Memorandum Opinion and Judgment (Oct. 6, 2008) 7a

App. C: Sixth Circuit Amended Order denying rehearing and rehearing en banc (Mar. 30, 2010) (original version filed Mar. 26, 2010) 30a

TABLE OF AUTHORITIES

Page

Cases:

Braam ex rel. Braam v. Washington,
150 Wn.2d 689, 81 P.3d 851 (2003) 26, 27

Brian A. v. Sundquist,
149 F.Supp.2d 941 (M.D. Tenn. 2000) ... 25, 26

Charlie H. v. Whitman,
83 F.Supp.2d 476 (D.N.J. 2000) 25

City of Revere v. Massachusetts General Hosp.,
463 U.S. 239 (1983) 9

County of Sacramento v. Lewis,
523 U.S. 833 (1998) 13

Currier v. Doran,
23 F.Supp.2d 1277 (D.N.M. 1998) 7

Daniels v. Williams,
474 U.S. 327 (1986) 13

DeShaney v. Winnebago County Dept. of Social Servs.,
489 U.S. 189 (1989) ..... *passim*

Doe v. New York City Dept. of Social Servs.,
649 F.2d 134 (2d Cir. 1981),
cert. denied, 464 U.S. 864 (1983) ..... *passim*

Estelle v. Gamble,
429 U.S. 97 (1976) ..... *passim*

Gregg v. Georgia,
428 U.S. 153 (1976) 17

Hernandez ex rel. Hernandez,
380 F.3d 872 (5th Cir. 2004) 19

James ex rel. James v. Friend,
458 F.3d 726 (8th Cir. 2006) 19

J.H. ex rel. Higgin v. Johnson,
346 F.3d 788 (7th Cir. 2003) 19

Johnson ex rel. Estate of Cano v. Holmes,
455 F.3d 1133 (10th Cir. 2006) 25

Jordan v. City of Philadelphia,
66 F.Supp.2d 638 (E.D. Pa. 1999) 25

Kara B. v. Dane County,
205 Wis.2d 140, 555 N.W.2d 630 (1996) 27

K.H. ex rel. Murphy v. Morgan,
914 F.2d 846 (7th Cir. 1990) 10, 18, 20, 21

LaShawn A. v. Dixon,
762 F.Supp. 959 (D.D.C. 1991) 25

Lewis v. Anderson,
308 F.3d 768 (7th Cir. 2002) 19, 20, 21, 22

Lintz v. Skipski,
25 F.3d 304 (6th Cir. 1994) 11, 27, 28, 29

Meador v. Cabinet for Human Resources,
902 F.2d 474 (6th Cir. 1990),
cert. denied, 498 U.S. 867 (1990) 11, 27

Nicini v. Morra,
212 F.3d 798 (3d Cir. 2000) 21, 22

Norfleet v. Arkansas Dept. of Human Servs.,
989 F.2d 289 (8th Cir. 1993) 10, 18

Phifer v. City of New York,
289 F.3d 49 (2d Cir. 2002) 19

Ray v. Foltz,
370 F.3d 1079 (11th Cir. 2004) 19

Taylor ex rel. Walker v. Ledbetter,
818 F.2d 791 (11th Cir. 1987) (*en banc*),
cert. denied, 489 U.S. 1065 (1989) . 9, 10, 18, 23

T.M. v. Carson,
93 F.Supp.2d 1179 (D. Wyo. 2000) 26

Uhlrig v. Harder,
64 F.3d 567 (10th Cir. 1995),
cert. denied, 516 U.S. 1118 (1996) 7

Wolff v. McDonnell,
418 U.S. 539 (1974) 13

Youngberg v. Romeo,
457 U.S. 307 (1982) . . . . . *passim*

Yvonne L. v. New Mexico Dept. of Human Servs.,
959 F.2d 883 (10th Cir. 1992) 10, 22, 24

Constitutional Provisions:

U.S. Const. amend. VIII 2, 5, 16, 17, 23, 30
U.S. Const. amend. XIV . . . . . *passim*

Statutes:

	1
28 U.S.C. § 1254	3
28 U.S.C. § 1331	4
28 U.S.C. § 1441(a)	*passim*
42 U.S.C. § 1983	

Rules:

	4
F.R.C.P. 56	6
Sup. Ct. R. 10	

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is not officially reported, but is reproduced in the Appendix hereto (App. A.) The memorandum opinion of the United States District Court for the Northern District of Ohio is not officially reported, but is reproduced in the Appendix hereto. (App. B.)

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit, affirming the decision of the United States District Court for the Northern District of Ohio, was handed down on February 2, 2010. A timely petition for rehearing *en banc* was denied by way of a final order on March 30, 2010. (App. C.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1:

> SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, Amendment VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

42 U.S.C. § 1983, Civil Action for Deprivation of Rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

On December 8, 2006, petitioners, Jianna Moore, Danielle Moore, and Frederick Waterwash, filed suit in the Lake County (Ohio) Common Pleas Court against respondents, the Lake County Department of Job and Family Services and a number of its

individual employees. The action was predicated upon very serious injuries sustained by the infant, Jianna Moore, while she was in the legal custody and supervisory control of the State of Ohio as placed in a foster home. The suit was designated as Lake County Common Pleas Court Case No. 06-CV-2928.

The complaint as amended set forth a federal claim under 42 U.S.C. § 1983. The basis for this cause of action was that respondents, as State actors, violated the Fourteenth Amendment substantive due process rights of Jianna Moore by taking custody of and placing her in a foster home, thereby creating a special relationship between the government and Jianna with concomitant duties to protect, supervise, and care for the infant while she was in the foster home chosen by the public officials. The allegation under § 1983 was that respondents failed to investigate, approve, train, and supervise the foster parents adequately, which ultimately led to severe injuries being inflicted upon the minor child in violation of her basic civil rights as guaranteed by the United States Constitution. The amended complaint also included a number of State law claims brought pursuant to the Ohio Revised Code.

Following the filing of an answer and extensive discovery between the parties, respondents filed a notice of removal in the State court indicating that the suit was being removed to the United States District Court for the Northern District of Ohio in Cleveland. The removal was predicated upon the existence of a federal question in the form of the § 1983 allegation. The United States District Court for the Northern District of Ohio had proper subject matter jurisdiction over the civil complaint under 28 U.S.C. § 1331 due to the inclusion by petitioners of a claim for relief brought

pursuant to 42 U.S.C. § 1983. The exercise of removal jurisdiction over the suit by the federal district court was proper under 28 U.S.C. § 1441(a), after it had originally been filed in State court, given the existence of the aforementioned federal question since the suit was one over which the federal court has original subject matter jurisdiction.

On June 21, 2007, the case was docketed in the district court as 1:07-CV-1852 after its removal from State court. On June 6, 2008, respondents filed a motion for summary judgment in the lower court pursuant to F.R.C.P. 56. Thereafter, petitioners submitted their response in opposition to the motion for summary judgment. After taking the matter under advisement for several months, the district court issued a memorandum opinion and accompanying judgment entry on October 6, 2008. (See App. B.) Pursuant to these filings, the lower court granted judgment as a matter of law to respondents with regard to the only federal cause of action in the complaint, to wit: the § 1983 claim. Upon doing so, the district court opted not to adjudicate the remaining State law claims in the suit, but rather remanded these claims to the Lake County Common Pleas Court.

Subsequently, on November 3, 2008, petitioners filed a timely notice of appeal with the Clerk of the Northern District of Ohio. The appeal was docketed in the United States Court of Appeals for the Sixth Circuit as Case No. 08-4565. Following briefing by the parties, an oral argument was held on October 14, 2009. The decision of the United States Court of Appeals for the Sixth Circuit, affirming the decision of the United States District Court for the Northern District of Ohio, was handed down on February 2,

2010. A timely petition for rehearing *en banc* was denied by way of a final order on March 30, 2010.

REASONS FOR ALLOWANCE OF THE WRIT

Due to circumstances usually far beyond their control, foster children have been removed from their parents by a State ostensibly to protect and advance their own best interests. As a result, foster children need both appropriate care and protection while in State mandated custody. The State owes these children more than mere benign indifference, and it is legally inappropriate to force them to endure constitutional deprivations absent a showing of deliberate indifference by their caretakers. Rather, the State must affirmatively take reasonable steps to provide for their care and safety. Accordingly, deliberate indifference is not well suited for analyzing the 42 U.S.C. § 1983 claims of the foster child class since that standard of liability was developed to adjudicate prisoner claims brought under the Eighth Amendment.

Across the country, most courts that have expressly considered both of the competing standards of care have determined that those public officials entrusted with the task of ensuring that foster children are placed in a safe and secure environment owe a constitutional duty that is determined by the professional judgment standard as developed by this Court in *Youngberg v. Romeo*, 457 U.S. 307 (1982). Pursuant to this standard, the State, as the custodian and caretaker of these children, is liable for the harm allegedly caused by a violation of a foster child's Fourteenth Amendment substantive due process right to be free from unreasonable risk of harm and to

reasonable safety only when the child's care, treatment, or services substantially depart from accepted professional judgment, standards, or practice.

As will be explained *infra*, the United States Court of Appeals for the Sixth Circuit entered a decision in the case at bar that is in direct conflict with the decision of another United States circuit court on the same important matter of federal constitutional law as expressly described in Rule 10 of the Rules of the Supreme Court of the United States. Thus, there is an overt conflict on this issue among the federal circuits. Moreover, the decision of the Sixth Circuit additionally conflicts with decisions rendered by at least two different State courts of last resort also as explicitly contemplated by the aforementioned Rule 10 considerations governing review on certiorari in this Court.

I. SUBSTANTIVE DUE PROCESS IN THE FOSTER CARE CONTEXT

A. A State's Fourteenth Amendment Duty to Protect Foster Children

In *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 195-197 (1989), this Court held that governmental agencies generally have no constitutional duty to protect a citizen from acts of violence committed by private individuals. As a general principle of law, therefore, it is well-settled that a State does not have a constitutional duty to protect its citizens from private violence.

Federal courts, however, have also recognized two well-established exceptions to the general rule that the

State is not constitutionally liable for violence committed by private individuals: (1) the "danger creation" theory; and (2) the "special relationship" doctrine. The danger creation theory applies when the State has created the danger of attack or mistreatment by private individuals or has rendered a person more vulnerable to such conduct. *Currier v. Doran*, 23 F. Supp.2d 1277, 1280 (D.N.M. 1998), citing *Uhlrig v. Harder*, 64 F.3d 567, 572 (10th Cir. 1995), cert. denied, 516 U.S. 1118 (1996).

The other exception to the *DeShaney* rule is the special relationship doctrine. This doctrine is triggered when the victim of the violence is somehow under the State's control, such as inmates of a prison or people involuntarily committed to a mental institution. It also clearly applies to children who are in the State's legal custody, whether such children have been placed into a private residential environment (*e.g.*, a foster home) or into an institutional setting (*e.g.*, a juvenile detention facility) operated by the State. Pursuant to the special relationship doctrine, the State is not required to provide its citizens with particular protective services under the Due Process Clause, and the failure to protect an individual against purely private violence does not constitute a violation of the Due Process Clause. *DeShaney*, 489 U.S. at 197. If the State, however, restrains an individual's freedom to act to protect himself or herself through a restraint on that individual's personal liberty, then the State may thereby enter into a special relationship during the period of such restraint to protect that individual from violent acts inflicted by others.

In the context of substantive due process analysis, it is the State's affirmative act of restraining the

individual's freedom to act on his or her own behalf (via penal incarceration, mental institutionalization, or other similar restraint of personal liberty) which constitutes the deprivation of liberty triggering the protections of the Due Process Clause of the Fourteenth Amendment. Thus, it is not the government's failure to act to protect the individual's liberty interests against harms inflicted by third parties, but rather the State's positive action of impeding the individual's ability to protect himself or herself through involuntarily imposed detention of some form that exposes the individual to tortious injury.

To this very day, this Court has never explicitly accorded recognition to or decided the extent of the due process rights to physical and psychological safety of children in foster care. Indeed, the primary holding of this Court in *DeShaney* is that there is no affirmative duty of the State to protect a child who is in his or her legal parents' custody. In a footnote, the Court recognized that:

> "Had the State by the affirmative exercise of its power removed Joshua from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect. Indeed, several Courts of Appeal have held, by analogy to *Estelle* and *Youngberg*, that the State may be held liable under the Due Process Clause for failing to protect children in foster homes from mistreatment at the hands of their foster parents." *DeShaney*, 489 U.S. at 201 n. 9 (citing

Doe v. New York City Dept. of Social Servs., 649 F.2d 134, 141-142 (2d Cir. 1981), cert. denied, 464 U.S. 864 (1983), and *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, 794-797 (11th Cir. 1987) (*en banc*), cert. denied, 489 U.S. 1065 (1989).

Hence, the *DeShaney* Court did not expressly bestow constitutional status to the right of foster children to be free from harm under the Fourteenth Amendment. This Court did, however, implicitly recognize such right when it analogized foster care to incarceration and institutionalization and seemed to speak favorably of the prior efforts of federal circuit courts of appeals to recognize the right of foster children to protection by the time *DeShaney* was decided in 1989.[1]

Thus, even before this Court accorded implicit recognition to the right of foster children to be free from harm while in State custody, decisions from at least two federal circuits had already explicitly supported the assertion of a clearly established constitutional right arising under the Fourteenth Amendment's Due Process Clause to reasonable safety in the foster care setting. As noted by the *DeShaney*

---

[1] Beyond this, it is undisputed that prior to *DeShaney*, this Court had found a substantive due process interest in safe conditions, personal security, and bodily integrity for persons in other forms of State custody. For example, the right to enforce this constitutional protection was established for pretrial detainees in *City of Revere v. Massachusetts General Hosp.*, 463 U.S. 239 (1983); for the institutionalized mentally retarded in *Youngberg v. Romeo*, 457 U.S. 307 (1982); and for incarcerated prisoners in *Estelle v. Gamble*, 429 U.S. 97 (1976).

Court, the leading and earliest circuit case was *Doe v. New York City Dept. of Social Servs.*, 649 F.2d 134 (2d Cir. 1981), cert. denied, 464 U.S. 864 (1983). In *Doe*, the Second Circuit squarely held that a child in governmental custody has a constitutional right not to be placed in a foster care setting known to be unsafe. Thereafter, the Eleventh Circuit, in *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987) (*en banc*), cert. denied, 489 U.S. 1065 (1989), held "that a child involuntarily placed in a foster home is in a situation so analogous to a prisoner in a penal institution and a child confined in a mental health facility that the foster child may bring a section 1983 action for violation of fourteenth amendment rights." (Footnote omitted.)

In the wake of *DeShaney* and its implicit recognition of the substantive due process right of foster children to be free from harm while in State custody, other federal courts of appeals began to adopt this right and incorporate the underlying legal analysis into their respective case law jurisprudence. See, *e.g.*, *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 848-849 (7th Cir. 1990); *Yvonne L. v. New Mexico Dept. of Human Servs.*, 959 F.2d 883, 891-893 (10th Cir. 1992); *Norfleet v. Arkansas Dept. of Human Servs.*, 989 F.2d 289, 293 (8th Cir. 1993). With the advent of this decisional law across the country, States and their individual employees in the foster care field were put on alert that children in the custody of the State had a constitutional right to be safe from harm. From this right flowed the inevitable legal conclusion that if persons responsible for the placement of such children in a private foster home or institutional facility abdicated their legal duty of care, then liability for harm inflicted on foster children would follow.

In the Sixth Circuit, the court recognized the right of foster children to be free from harm shortly after the decision of the Supreme Court in *DeShaney*. Specifically, in *Meador v. Cabinet for Human Resources*, 902 F.2d 474, 476 (6th Cir. 1990), cert. denied, 498 U.S. 867 (1990), the court held that "due process extends the right to be free from the infliction of unnecessary harm to children in state-regulated foster homes." Hence, as of May 1990, foster children were accorded substantive due process rights in the Sixth Circuit and, consequently, a federal cause of action was deemed to exist since that time. See *Lintz v. Skipski*, 25 F.3d 304 (6th Cir. 1994).

In the case *sub judice*, the district court correctly noted that foster children have a constitutional substantive due process right to be free from harm and that such right traces its origins in the Sixth Circuit back to *Meador*. (See App. B, District Court Memorandum Opinion.) It is, therefore, uncontroverted that petitioners in the within action properly alleged the deprivation of a federal constitutional right under their 42 U.S.C. § 1983 cause of action.

B. The Scope of the Constitutional Duty to Protect Foster Children and the Required Standard of Care

Since implicitly approving of the extension of substantive due process rights to foster children by way of footnote 9 in *DeShaney*, this Court has not explicitly revisited the issue. Of course, while the aforementioned footnote has universally been read by lower federal and State courts throughout the nation as according recognition to the right to be free from

harm in foster care, what was left unresolved by this Court in *DeShaney* is legal standard governing such claims. Specifically, what is the appropriate standard of culpability for measuring alleged violations of the substantive due process rights of foster children? *DeShaney* was silent on this point, and this Court has never clarified what standard of care governs to this day.

Not surprisingly, given the absence of a clear mandate from this Court, lower federal and State courts have been left to their own devices in terms of adopting a standard of care to resolve claims to the effect that foster children have been exposed to an unreasonable risk of harm and a deprivation of the right to reasonable safety. In this vacuum devoid of a definitive pronouncement from this Court, courts across the country have generally endorsed one of two competing views as to the proper scope of the constitutional duty to protect the substantive due process right of foster children to be free from harm and the corresponding standard of care to be imposed upon the State and its individual employees charged with carrying out children services responsibilities: (1) the professional judgment standard; and (2) the deliberate indifference or shock-the-conscience test.

Obviously, the scope of the duty and the concomitant legal standard of care are tremendously important when determining whether the State actor is liable under § 1983 for failing to meet its obligations to those foster children in its custody and care. As a result, the genesis of each school of thought and its subsequent history will be briefly examined in turn.

At the outset, it should be noted that both professional judgment and deliberate indifference require much more than common law negligence or statutory negligence *per se*. When State action is evaluated to determine whether substantive due process has been violated in a particular case, the touchstone of any judicial analysis is the "'protection of the individual against arbitrary action of government.'" *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). This Court has made it clear that mere negligence is never sufficient for imposing substantive due process liability. *Daniels v. Williams*, 474 U.S. 327 (1986). Ergo, something more than negligence is always required on the part of the State actor in order to find a due process violation under the Fourteenth Amendment.

Having established that both competing standards mandate a higher level of State misconduct than mere negligence, it would be helpful to sketch out a description of each. Under the professional judgment standard, a plaintiff must prove that the State action was such a substantial departure from accepted professional judgment, standards, or practice as to demonstrate that the person responsible actually did not base the decision on such a judgment. The proper inquiry is whether the State's conduct falls substantially short of the exercise of that level of professional judgment, standards, or practice that are widely accepted by skilled professionals in the field.

Professional judgment is still a relatively deferential standard from the State's perspective. It requires only that the State actor exercise sound, rational judgment in choosing a professionally

appropriate course of action. In contrast, negligence imposes on the State official the burden of choosing, from among competing options, a course of action that is consistent with the exercise of "due care" by a "reasonable person." In other words, negligence requires the State actor to reject a negligent alternative that might nevertheless satisfy the more rigorous demands of the professional judgment standard. Professional judgment is, therefore, a less onerous standard than negligence from the viewpoint of the public actor.

In contrast, the deliberate indifference theory is oftentimes equated with a shock-the-conscience analysis. Stated starkly, proponents of the deliberate indifference school of thought adhere to the notion that substantive due process liability attaches only to executive State action that is so ill-conceived, if not malicious, that it shocks the conscience. In the context of a custodial relationship, a substantive due process violation will be found to have occurred only if the official conduct or inaction by the public actor is so egregious and outrageous that it can be said that the State official acted with deliberate indifference to the needs and safety of the individual in custody. Deliberate indifference requires that the official must have been aware of facts from which an inference could be drawn that a substantial risk of serious harm to the individual existed, and the official deliberately ignored the risk after actually drawing such inference.

The professional judgment standard traces its roots to the decision of this Court in *Youngberg v. Romeo*, 457 U.S. 307 (1982). In *Youngberg*, an individual involuntarily committed to a State institution for the mentally handicapped claimed that he had a

constitutionally protected due process liberty interest in safety, freedom of movement, and training while confined against his will within the institution. On appeal, this Court not only recognized that the State had obvious obligations to provide adequate food, shelter, clothing, and medical care to individuals in a mental institution, but also that the State had the unquestioned duty to provide for the reasonable safety of all of the involuntarily committed residents of the facility.

Having recognized the government's duty to provide the aforementioned care to those individuals with mental health issues committed to the custody of the State, the *Youngberg* Court needed to set forth a standard of care by which compliance with the duty could be measured. In this regard, the Court adjudged that "liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Youngberg*, 457 U.S. at 323. As will be explained *infra*, the deliberate indifference standard had previously been applied by the Court to prisoners several years prior to its decision in *Youngberg*. The Court, however, specifically declined to impose the deliberate indifference framework in the mental institution setting because "[p]ersons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." *Id.* at 321-322. The foregoing language strongly suggests that the standard to be applied to a particular class of individuals is to be determined by whether the individual in question is

responsible for his or her own confinement, thereby giving rise to legitimate State interests in retribution and deterrence through the imposition of punishment. As will be explored in further detail below, this has extremely important implications when considering which standard of care is appropriate in the foster care context.

The professional judgment analysis and its focus upon the involuntary nature of the commitment that had been imposed upon the injured individual is still held in esteem by this Court. Of particular significance in this regard is Chief Justice Rehnquist's majority opinion in *DeShaney*, which contains a discussion of the continuing viability of *Youngberg* and the affirmative obligation that it imposes upon public officials under the Due Process Clause of the Fourteenth Amendment to ensure the reasonable safety of those less fortunate individuals who have been involuntarily committed to the care of the State. *DeShaney*, 489 U.S. at 199-200.

By contrast, the deliberate indifference standard derives from the prison context where the aggrieved class of plaintiffs is incarcerated as a result of their voluntary criminal conduct. Moreover, the standard traces its constitutional roots to the Eighth Amendment Cruel and Unusual Punishment Clause, not the Fourteenth Amendment Due Process Clause. These two critical points serve to highlight the fundamental impropriety of applying this analysis in the foster care context.

In *Estelle v. Gamble*, 429 U.S. 97 (1976), a prisoner brought a § 1983 action contending that he had been subjected to cruel and unusual punishment in violation

of the Eighth Amendment by virtue of the substandard medical treatment that he had allegedly received while an inmate of the Texas Department of Corrections. On appeal, this Court opined that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment." *Estelle* at 104, quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976). In the aftermath of this decision, deliberate indifference to a prisoner's serious illness or injury stated a proper cause of action under § 1983.

C. Federal Court and State Supreme Court Jurisprudence

As the foregoing discussion has made evident, there has been virtually universal agreement among American courts over the past several decades that foster children have the requisite special relationship with the State by virtue of their custodial status to trigger the constitutional protections of substantive due process. Indeed, the Fourteenth Amendment has been understood to impose upon the various States not merely the responsibility to provide a minimal level of adequate food, shelter, clothing, and medical care, but also to protect foster children from physical danger. Although this right is not to be construed so broadly as to guarantee placement in an optimal foster home, the fact that foster care systems in this nation are created and regulated by the State does not absolve public officials from liability for violating the constitutionally protected liberty interest of foster children to be free from harm.

Although this Court in *DeShaney* did not expressly accord recognition to the existence of this right, it

seemed to bestow implicit approval to this due process interest in footnote 9 of its decision by referencing *Doe* and *Taylor*, *supra*. Of course, the Second Circuit in *Doe* was the very first federal circuit to recognize the right. In this regard, *Doe* was the seminal case that would serve as the model for other circuits as the right subsequently spread across the country via case law.

It should be noted that *Doe* was decided in 1981. This was five years after this Court decided the § 1983 action addressing deliberate indifference towards incarcerated prisoners in *Estelle* in 1976. It was, however, one year before this Court released its opinion in *Youngberg* in 1982 recognizing the professional judgment standard in the § 1983 context of institutionalized mental patients. Thus, the professional judgment standard had not yet been recognized by the Court in *Youngberg* when the Second Circuit applied deliberate indifference in *Doe*.

Not surprisingly, the deliberate indifference standard was subsequently adopted by many other federal circuit courts of appeals in the years subsequent to *Doe* because that case was the leading initial authority in the area of § 1983 foster care actions. See, *e.g.*, *K.H. ex rel. Murphy v. Morgan*, *supra* (7th Cir. 1990); *Norfleet v. Arkansas Dept. of Human Servs.*, *supra* (8th Cir. 1993). In virtually every one of these cases, the federal circuit neither discussed nor analyzed the application of the deliberate indifference standard versus the professional judgment standard. Rather, the appellate court would simply recognize the due process right of foster children to be free from harm and then merely state unequivocally that the test for assessing culpability was deliberate indifference with absolutely no corresponding

discussion of the relative merits of the professional judgment standard as recognized by the *Youngberg* Court after *Doe* was decided by the Second Circuit. As a result, these federal circuits still to this day apply the deliberate indifference level of culpability without having conducted a side-by-side comparison of the competing standards of care. See, *e.g.*, *Phifer v. City of New York*, 289 F.3d 49 (2d Cir. 2002); *Hernandez ex rel. Hernandez*, 380 F.3d 872 (5th Cir. 2004); *Lewis v. Anderson*, 308 F.3d 768 (7th Cir. 2002); *James ex rel. James v. Friend*, 458 F.3d 726 (8th Cir. 2006); *Ray v. Foltz*, 370 F.3d 1079 (11th Cir. 2004).

In most of these cases (especially the earliest decisions rendered in the 1980s and early 1990s), it is not that these federal circuits were even presented with both the professional judgment and deliberate indifference standards of conduct in the parties' briefing and then merely chose the latter standard without explanation. In most instances, it seems that the parties were either: (a) unaware of the professional judgment standard that had been recognized in the Fourteenth Amendment environment by this Court in *Youngberg*; or (b) the parties believed that deliberate indifference was somehow automatically applicable simply because the Second Circuit had applied this framework back in 1981 in *Doe*, which was the first such decision ever to extend a § 1983 cause of action to foster children.

Indeed, to date, petitioners are only aware of one federal appellate court that has ever even briefly considered professional judgment as a standard and then chosen deliberate indifference. In *J.H. ex rel. Higgin v. Johnson*, 346 F.3d 788, 792-793 (7th Cir. 2003), the Seventh Circuit held as follows:

"The plaintiffs vigorously argue that the appropriate standard for analyzing this case is the 'professional judgment' standard as articulated in *Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982) (holding that decisions regarding the safety training of involuntarily committed mentally retarded persons made by a professional can be the basis for § 1983 liability only when the decision substantially departed from accepted professional judgment). **Employing this standard would amount to us overruling our decisions in *K.H.* [*ex rel. Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990)]and *Lewis* [*v. Anderson*, 308 F.3d 768 (7th Cir. 2002)].** As *K.H.* made clear, a professional judgment exercised by a child welfare worker serves as a 'secure haven from liability' rather than the starting point for determining liability. *K.H.*, 914 F.2d at 854. ('Only if without justification based either on financial constraints or on considerations of professional judgment [child welfare workers] place the child in hands they know to be dangerous or otherwise unfit do they expose themselves to liability in damages.'). A bonafide professional judgment may shield the state's caseworkers and supervisors who acted despite knowledge of a risky placement from liability, but whether such a professional judgment was exercised is not the threshold determination. Knowledge or suspicion that a foster parent is a probable child abuser remains the legal yardstick for measuring the culpability of state actors in § 1983 cases like this one." (Emphasis added.)

As the foregoing passage makes clear, the Seventh Circuit essentially reaffirmed its adherence to the deliberate indifference analysis because it did not want to revisit its prior decisions in *K.H.* and *Lewis*, let alone seriously assess the underlying validity of its adoption of the deliberate indifference standard which could lead to the overruling of the aforementioned decisions. The Seventh Circuit did not weigh the relative merits of the competing standards or consider the legal arguments supporting the adoption of the more appropriate test of professional judgment in its written opinion. Instead, the Seventh Circuit merely stated that deliberate indifference remains the "legal yardstick" for evaluating a § 1983 cause of action brought by a foster child.

Another federal circuit court has openly questioned whether professional judgment should be the governing standard in the foster care context, but opted to pass on the opportunity to answer the question simply because the parties apparently did not raise the issue in their briefing or subsequently at oral arguments. In *Nicini v. Morra*, 212 F.3d 798 (3d Cir. 2000), the Third Circuit for the first time recognized that the State enters into a special relationship with a foster child which imposes affirmative duties upon the government, thereby giving rise to a possible § 1983 cause of action over the failure to perform said duties. Upon doing so, the Third Circuit adopted deliberate indifference as the governing standard of liability. The appellate court, however, included a footnote at the end of the sentence in which it endorsed the deliberate indifference standard. The footnote reads:"We note that in *Youngberg*, the Supreme Court held that 'professional' decisionmakers would be liable for violating the substantive due process rights of an

involuntarily institutionalized mentally retarded plaintiff if their conduct was 'such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.' 457 U.S. at 323. ***

> "In response to our inquiry, neither Nicini [the foster child plaintiff] nor Cyrus [one of the individually named social worker defendants] suggested that the professional judgment standard is appropriate. Therefore, we do not decide whether, consistent with *Lewis*, that standard could be applied to Cyrus's conduct." *Nicini*, 212 F.3d 811, fn. 9.

Hence, the Third Circuit declined to address whether the application of the professional judgment standard to foster children is more appropriate because the parties had neither briefed nor argued the issue. Indeed, it was left to the *Nicini* court itself even to ask the rhetorical question. In the absence of the parties addressing the issue, however, the Third Circuit declined to answer its own query and instead simply endorsed deliberate indifference since that had been the prevailing test since the release of *Doe* in 1981 by the Second Circuit.

At least one federal circuit, however, has expressly adopted the professional judgment standard as the proper "legal yardstick" for evaluating a § 1983 cause of action brought by a foster child. In *Yvonne L.*, *supra*, the Tenth Circuit addressed the standard to apply in determining the liability of State actors who place children in a foster home where the children are ultimately either physically or sexually abused. The

appellate court found that State officials will not be liable for harm to a foster child as long as they exercised proper professional judgment. The Tenth Circuit opined:

> "The standard to be applied, however, is a legal issue, which we determine here to give guidance to the district court on the remand. Defendants assert that deliberate indifference, as articulated by the Supreme Court in *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), is the appropriate standard. In *Estelle*, the Supreme Court held that if prison officials display deliberate indifference to a prisoner's serious illness or injury, they violate the Eighth Amendment right against cruel and unusual punishment. The Second and Eleventh Circuits appear to have adopted this standard in cases involving the constitutional right of children in state custody to reasonable safety while in foster care environment. See *Taylor*, 818 F.2d at 795-97; *Doe*, 649 F.2d at 141-45.
>
> "Plaintiffs argue that the Eight[h] Amendment standard is inappropriate, and urge that we adopt the standard that the Supreme Court applied in *Youngberg*, 457 U.S. at 323, 102 S.Ct. at 2462. The *Youngberg* Court held that a mentally retarded person committed to a state institution had a Fourteenth Amendment right to reasonable protection from physical harm. *Id.* at 315-16, 102 S.Ct. at 2457-58. The standard set out in *Youngberg* was that state officials would be shielded from liability unless the defendants showed that they failed to exercise professional judgment. *** 'Failure to exercise

> professional judgment' does not mean mere negligence as we understand *Youngberg*; while it does not require actual knowledge the children will be harmed, it implies abdication of the duty to act professionally in making the placements. To the extent there is a difference in the standards, **we agree *** that the *Youngberg* standard applies. The compelling appeal of the argument for the professional judgment standard is that foster children, like involuntarily committed patients, are 'entitled to more considerate treatment and conditions' than criminals.** *Youngberg*, 457 U.S. at 321-22, 102 S.Ct. at 2461-62. These are young children, taken by the state from their parents for reasons that generally are not the fault of the children themselves. The officials who place the children are acting in place of the parents." (Emphasis added.) *Yvonne L.*, 959 F.2d at 893-894.

The Tenth Circuit, therefore, has explicitly endorsed professional judgment as the governing standard for enforcing the rights of foster children to be free from harm while in State custody. In doing so, the *Yvonne L.* court correctly observed that foster children are certainly entitled to more humane and considerate treatment and conditions than common criminals, thereby leading to the inescapable conclusion that the standard and supporting analysis laid out by this Court in *Youngberg* as applied to mentally retarded individuals should apply with equal force in the foster care setting.

The Tenth Circuit is still applying the professional judgment standard to this day. See, *e.g.*, *Johnson ex rel. Estate of Cano v. Holmes*, 455 F.3d 1133, 1143 (10th Cir. 2006). Hence, the conflict among federal circuits is still manifestly apparent, thereby meaning that a different standard of constitutional tort liability is being applied in different States in this country based upon in which federal appellate circuit the State is located.

A number of federal district courts that have considered the issue have also cogently determined that children in foster care are much more analogous to the involuntarily committed mentally retarded patients in *Youngberg* than the incarcerated prisoners of *Estelle*, thereby arriving at the conclusion that professional judgment should be the governing standard for adjudicating § 1983 claims brought by foster children. For instance, the United States District Court for the Middle District of Tennessee took up the question of which competing standard should apply in an action brought by foster children against the Tennessee Department of Children's Services. After considering both standards, the district court held that the professional judgment analysis of *Youngberg* should be the test by which the foster children's substantive due process claims should be measured to determine State liability. *Brian A. v. Sundquist*, 149 F.Supp.2d 941, 953-954 (M.D. Tenn. 2000). Accord *LaShawn A. v. Dixon*, 762 F.Supp. 959 (D.D.C. 1991) (addressing the competing standards and then applying the professional judgment framework). See, also, *Charlie H. v. Whitman*, 83 F.Supp.2d 476 (D.N.J. 2000); *Jordan v. City of Philadelphia*, 66 F.Supp.2d 638 (E.D. Pa. 1999). Other district courts have arrived at the exact same

conclusion. See, *e.g.*, *T.M. v. Carson*, 93 F.Supp.2d 1179 (D. Wyo. 2000) (wherein the District Court of Wyoming engaged in an exhaustive side-by-side analysis of both standards before ultimately concluding that professional judgment should define the scope of the constitutional duty to protect children in foster care).

Finally, at least two State supreme courts have also placed professional judgment alongside deliberate indifference and weighed the relative merits of each competing standard in the foster care context before embracing professional judgment as the appropriate legal yardstick for gauging § 1983 actions brought by foster children. In *Braam ex rel. Braam v. Washington*, 150 Wn.2d 689, 81 P.3d 851 (2003), the Supreme Court of Washington accurately noted that the vast majority of federal circuit courts that had adopted deliberate indifference had never actually engaged in a comparison of the two standards, but rather had simply applied the standard presented to them by the parties. *Braam*, 150 Wn.2d at 702, 81 P.3d at 859. Upon analyzing professional judgment and deliberate indifference beside one another in the foster care setting, the Supreme Court of Washington concluded:

> "Accordingly, **we hold that "deliberate indifference" is not well suited for analyzing the claims of the class**. Foster children are entitled to a high standard. Accord *Brian A.*, 149 F.Supp.2d at 953-954. Something more than refraining from indifferent action is required to protect these innocents. *** **We hold that the appropriate culpability standard is the professional judgment standard**, *i.e.*, the exercise of professional

judgment made in accord with accepted professional standards or practice." (Emphasis added.) *Id.*, 150 Wn.2d at 703-704, 81 P.3d at 859.

In *Kara B. v. Dane County*, 205 Wis.2d 140, 555 N.W.2d 630 (1996), the Supreme Court of Wisconsin held that public officials were not entitled to qualified immunity if their actions allegedly violated someone's clearly established constitutional right. The relevant inquiry was whether, at the time the government official acted, he or she knew or should have known that the action would deprive an individual of a constitutional right. If so, then the official would not be protected from suit for civil damages. The *Kara B.* court went on to hold that the appropriate scope of the constitutionally imposed duty to place foster children in a safe and secure environment is the professional judgment standard of *Youngberg* because it is more closely analogous to claims involving foster children than the deliberate indifference threshold for prisoner claims as developed in *Estelle*.

D. Sixth Circuit Case Law

As noted previously, the Sixth Circuit recognized the right of foster children to be free from harm in *Meador*, *supra*, back in May 1990. The *Meador* decision, however, left undefined the specific standard of conduct required of State officials in order to protect the Fourteenth Amendment substantive due process rights of foster children.

Several years later, the Sixth Circuit chose deliberate indifference in *Lintz*, *supra*. In doing so, however, the *Lintz* Court never mentioned the term

"professional judgment" and did not conduct a side-by-side comparison of the relative merits of the competing standards before arriving at a decision. In fact, the sum total of the analysis at the time was that deliberate indifference was "the prevailing standard now being applied in such cases." *Lintz*, 25 F.3d at 306. Hence, professional judgment as a constitutional standard of culpability has never been considered in the Sixth Circuit and the arguments supporting its adoption in the foster care context have never been directly addressed. Rather, deliberate indifference was established as the law of the Sixth Circuit almost by default simply because it was the "prevailing standard" that had been previously adopted by other federal appellate courts without analysis starting in 1981 with the *Doe* decision from the Second Circuit.

In the case *sub judice*, the district court applied the deliberate indifference standard to the § 1983 claim brought by petitioners. (See App. B, District Court Memorandum Opinion.) Upon doing so, the lower court determined that the evidence did not support the conclusion that the public officials in this case absolutely knew that a substantial risk of serious physical harm to Jianna Moore existed and that said officials deliberately ignored the significant risk which resulted in severe injuries being inflicted upon the baby.

When applying the deliberate indifference analysis as articulated by this Court in the *Estelle* prisoner context, the district court made the following observation:

> "While **the Court is sympathetic to Plaintiffs' contention that foster children**

> **should be entitled to a higher standard of care than prisoners such as a 'professional judgment' standard**, this Court is bound by the decision of the Sixth Circuit holding that the standard of care in foster care cases in this Circuit is 'deliberate indifference.' *Linzt* [*sic*], 25 F.3d at 305." (Emphasis added.) (See App. B, District Court Memorandum Opinion.)

Thus, it is apparent that the district court was very sympathetic to the position taken below by petitioners that professional judgment is the much more appropriate standard of care to be applied to foster children who have been involuntarily taken into custody by the State through no fault of their own. The district court, however, felt bound by *Lintz* as the relevant precedent in the Sixth Circuit, despite the fact that *Lintz* did not undertake any discussion of professional judgment and merely endorsed deliberate indifference as the "prevailing standard" that had been adopted without any analysis by a number of courts after *Doe*.

On appeal, the three-judge panel of the Sixth Circuit who heard this matter felt bound by the prior decision as rendered in *Lintz* simply because it is a fundamental principle of the Sixth Circuit that one panel can not overrule the decision of another panel. Accordingly, the panel held that the prior decision in *Lintz* would remain controlling authority unless an inconsistent decision of the United States Supreme Court required modification of the decision. In doing so, however, the three-judge panel went out of its way to state explicitly that it was making "no determination as to which standard, 'deliberate indifference' or 'professional judgment,' is a more

appropriate one to apply in determining whether a child's right to be free from harm while in state foster care is violated." (See App. A, Sixth Circuit Opinion.)

Petitioners now ask this Court to do what has never been done before, to wit: to consider professional judgment as a constitutional standard of liability and the arguments supporting its adoption as the appropriate and humane measuring stick for the treatment of foster care children who are in State custody and care throughout the nation. Each of these arguments will be briefly examined in turn below.

II. ARGUMENTS IN SUPPORT OF THE PROFESSIONAL JUDGMENT STANDARD

A. Foster Children are More Akin to the Mentally Retarded, not Prisoners

In *Youngberg*, this Court's choice of the professional judgment standard for State care rendered in mental institutions, rather than the more permissive deliberate indifference standard, was grounded in the recognition that "[p]ersons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." *Youngberg*, 457 U.S. at 321-322. This consideration is at the very least equally, if not even more, prevailing when the State assigns innocent children to foster homes.

It should also be noted that the *Estelle* deliberate indifference analytical framework was created in the context of adjudicating an Eighth Amendment claim pursuant to the Cruel and Unusual Punishment

Clause as asserted by a prisoner. By definition, prisoners are incarcerated and deprived of personal liberty in order to punish them for criminal misconduct which flowed from their voluntary decisions and actions in breaking the law.

In stark contrast, the *Youngberg* professional judgment standard was crafted by this Court in the context of ruling upon a § 1983 cause of action brought by a mentally retarded person under the Fourteenth Amendment Due Process Clause. Obviously, punishment is not even remotely the basis for restricting such a person's freedom of movement. Care and physical safety are the goals of the State custody. Moreover, mental retardation is a non-voluntary medical condition.

Since foster children have been accorded a legally cognizable constitutional right to be free from harm, it only makes sense analytically that the standard to be applied to such claims is that which was developed by this Court in *Youngberg*, to wit: professional judgment. Like the mentally retarded, foster children as a class exhibit the following characteristics: (1) they are asserting a Fourteenth Amendment substantive due process right; (2) their commitment to foster homes is not punitive, but rather is designed to promote their care and physical safety; and (3) their status as wards of the State is almost always completely non-voluntary as it is based on the inability of their parents to care for them.

B. Deliberate Indifference Encourages Public Officials to Ignore Danger

Deliberate indifference is predicated upon the principle that the State should incur no liability whatsoever to an abused foster child so long as public officials did not know that substantial harm would be inflicted upon the child. The "knowledge" requirement is the very touchstone of the deliberate indifference analysis.

Such a position, however, encourages an "ostrich" approach to the placement of foster children. Under this nearly impossible standard requiring actual knowledge (where "should have known" is not even good enough), a victimized foster child can be left to the clutches of an abuser as long as the relevant foster care official can claim that he or she did not actually know that the child was going to be abused. In other words, it encourages the very same public officials who are charged with caring for children taken by the State from their natural homes either to bury their heads in the sand or to look the other way when placing and monitoring these children in foster homes, thereby giving themselves absolute legal cover from any subsequent § 1983 cause of action when the child is ultimately murdered, seriously injured, or sexually abused.

C. The Professional Judgment Standard is Tailored to the Foster Care Context

The professional judgment standard represents more than just a difference in the degree of malfeasance, but in the kind of malfeasance that is cognizable in a § 1983 cause of action. In *Youngberg*, in

which the professional judgment standard was first employed, this Court established that a decision is presumptively valid if made by a professional; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards so as to demonstrate that the person responsible actually did not base the decision on such a judgment. *Youngberg*, 457 U.S. at 323. The Court designated professional standards as the baseline from which a public official's conduct should be measured, rather than the conduct of the so called "reasonable person" which governs determinations of common law negligence and recklessness.[2]

While the *Youngberg* Court did not fully delineate the professional judgment standard in its decision, it acknowledged that it was adopting the framework employed by then Chief Judge Seitz in his opinion concurring in the *en banc* Third Circuit panel's holding in the same case. Judge Seitz's concurrence differentiated a constitutional tort from the insufficiently deferential malpractice standard. He insisted, and this Court subsequently agreed, that the Constitution only requires that courts make certain that professional judgment was in fact exercised, thereby precluding any assessment of which of several

---

[2] By transforming the relevant baseline from which to evaluate State conduct, this Court tacitly enhanced the importance of expert testimony to the point where, in all but the most clear cut cases, such testimony on the exercise of professional judgment will likely be necessary. Consequently, the professional judgment standard is certainly more exacting than professional malpractice; liability may attach only when the defendant failed to meet accepted minimum standards of sound professional judgment.

professionally acceptable choices should have been made.

In the foster care arena, the law should require that public officials respond not just to risks of harm which they have been put on notice of (*i.e.*, deliberate indifference), but to act in a manner which avails them of that notice (*i.e.*, professional judgment). The placement of a foster child into a particular home is critical to that child's subsequent health and welfare, thereby making such decisions especially tailored to the professional judgment standard.

D. Public Policy Considerations

Due to circumstances beyond their control, foster children have been removed from their parents by the government with the stated goals of promoting and protecting the best interest of the child. In the vast majority of cases, such children are innocent victims. It can not seriously be argued that the State owes foster children more than mere benign indifference and that public officials charged with protecting these children must affirmatively take reasonable steps to provide for their care and safety.

No one is suggesting that public caretakers should be held liable for constitutional deprivations when those individuals exercised valid professional judgment in determining a sound course of conduct in placing and monitoring a particular foster child. Indeed, the exercise of such professional judgment is a safe haven from liability in those instances. At the same time, however, a foster child that has done society no wrong should certainly not be forced to endure constitutional deprivations in the mere absence

of a showing of deliberate indifference to a known risk of physical harm by his or her public caretakers.

The professional judgment standard allows the particularized inquiry that best protects foster children from harm . . . the very same cognizable constitutional tort that virtually every lower court in this country has recognized in the wake of *DeShaney*. Without question, sound public policy demands that the State, as the custodian and caretaker of foster children, be held liable for the harm allegedly caused by a violation of a foster child's substantive due process right to be free from unreasonable risk of harm and to reasonable safety when his or her placement, care, treatment, or services substantially departs from accepted professional judgment, practice, or standards.

CONCLUSION

Based upon the foregoing reasons, Jianna Moore, Danielle Moore, and Frederick Waterwash, petitioners herein, hereby respectfully request the issuance of a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

BRIAN L. SUMMERS
Counsel of Record
7327 Center Street
Mentor, Ohio 44060
(440) 255-4100
summerslawfirm@aol.com

Attorney for Petitioners

APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A: Sixth Circuit Opinion (Feb. 2, 2010) 1a

Appendix B: District Court Memorandum Opinion and Judgment (Oct. 6, 2008) 7a

Appendix C: Sixth Circuit Amended Order denying rehearing and rehearing en banc (Mar. 30, 2010) (original version filed Mar. 26, 2010) 30a

APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
File Name: 10a0065n.06

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 08-4565

[Filed February 2, 2010]

JIANNA MOORE, et al.,	)
	)
Plaintiffs-Appellants,	)
	)
v.	)
	)
LAKE COUNTY DEPARTMENT OF JOB AND FAMILY SERVICES, et al.,	)
	)
Defendants-Appellees.	)
	)

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

BEFORE: BATCHELDER, Chief Judge, GRIFFIN, Circuit Judge, and TARNOW, District Judge.*

TARNOW, District Judge.

Jianna Moore, a minor, by her birth parents, Danielle Moore and Frederick Waterwash, and Moore and Waterwash on their own behalf, appeal the district court's grant of Defendants' motion for summary judgment. Plaintiffs argue that this panel should adopt "professional judgment" as the standard of culpability under which a child's due process right to be free from harm while in a state foster home is evaluated, overruling this court's decision in *Lintz v. Skipski*, 25 F.3d 304 (6th Cir. 1994) establishing "deliberate indifference" as the standard. For the reasons that follow, we decline to adopt the "professional judgment" standard and affirm the district court's ruling.

I.

In July 2002, Raymond and Lisa Knapp went to the Lake County Department of Job and Family Services (LCDJFS) seeking to adopt a child. Following their application, the Knapps underwent pre-service training, taking classes with curriculum developed by the Ohio Department of Children and Family Services. A home study was completed, in accordance with Ohio law, that included background checks, a check of personal and employment references, and medical evaluations. The couple also completed a self

---

* The Honorable Arthur J. Tarnow, United States District Judge for the Eastern District of Michigan, sitting by designation.

assessment where theyindicated that their infant care skills needed some development.

The Knapps were approved as adoptive parents in June 2003. Ultimately, after determining that it might be difficult to adopt a young child because of the limited number of children in the newborn to three-year-old age bracket available strictly for adoption, the Knapps decided they wanted to serve as foster parents and were licensed as such. Theycontinued to receive training after their approval, completing the twenty hours of training sessions that were required between September 2003 and September 2004.

In December 2004, LCDJFS was granted emergency custody of Jianna Moore, a newborn, and placed her with the Knapps. During Jianna's placement, Erin Whipple, a social worker with LCDJFS, regularly visited the home under the supervision of LCDJFS supervisor Melanie Hale to monitor the child's well-being. Ms. Whipple also saw the child weekly at the birth mother's supervised agency visits and spoke with the Knapps by phone twice per week. Neither Ms. Hale nor Ms. Whipple had any specific concerns about the safety of the child. Jianna's mother, Danielle Moore, did not observe any signs of physical harm during her regular supervised visits.

On February 3, 2005, Jianna suffered injuries consistent with "shaken baby syndrome." LCDJFS and the Mentor Police Department investigated and determined that the injuries resulted from physical abuse that occurred while the child was in the Knapps' custody. No criminal charges were brought against

the Knapps, but a civil suit was brought by the child's mother.[1] Danielle Moore ultimately regained custody of her daughter.

II.

Jianna Moore, by and with her birth parents, filed a complaint against LCDJFS and several of its employees or agents in the Lake County Court of Common Pleas alleging a federal claim under 42 U.S.C. § 1983 and various state claims. Plaintiffs' § 1983 claim alleged that Defendants' failure to investigate, train, and monitor the foster parents caring for the child deprived Jianna of her civil rights as guaranteed by the United States and Ohio Constitutions. Defendants subsequently filed a motion for summary judgment, which the district court granted as to the § 1983 claim against LCDJFS since Plaintiffs were unable to demonstrate that a lack of an agency policy basing foster care placements upon foster parents' self assessments caused any violation of a constitutional right.

The district court also concluded that the individual defendants were entitled to qualified immunity. Although under *Meador v. Cabinet for Human Resources*, 902 F.2d 474, 476 (6th Cir. 1990) and *Lintz*, supra, it is clearly established law in the Sixth Circuit that a child has a due process right to be free from harm while in a state foster home, no violation of that

---

[1] Detective Colleen Petro, who investigated the incident, testified that she recommended to the prosecutor that criminal charges be brought against Ms. Knapp but he declined to do so because he was concerned that he could not prove the allegations beyond a reasonable doubt.

right had occurred since Plaintiffs did not demonstrate that Defendants' conduct constituted "deliberate indifference" to Jianna's safety. The district court did note, however, that although it was sympathetic to Plaintiff's argument that "professional judgment" is a more appropriate standard of culpability to apply in the foster care context, it was bound by *Lintz*, supra, to apply the "deliberate indifference" standard.

III.

Plaintiffs asks this panel to overrule this court's prior ruling in *Lintz*, supra, and establish the "professional judgment" standard as the requisite standard of culpability in determining whether a state has violated a foster child's due process right to be free from harm while in a state foster home. However, we decline to do so, as "a fundamental principle of this court is that '[a] panel... cannot overrule the decision of another panel. The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision." *See United States v. Ables*, 167 F.3d 1021, 1027 (6th Cir. 1999), quoting *Salmi v. Secretary of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985).

After hearing oral argument and thoroughly examining the briefs and record in this case, this court concludes that the district court properly applied the prevailing standard of "deliberate indifference" in evaluating Plaintiff's § 1983 claim. Accordingly, we affirm the judgment of the district court for the reasons stated in its opinion entered on October 6, 2008. In doing so, this court makes no determination

as to which standard, "deliberate indifference" or "professional judgment," is a more appropriate one to apply in determining whether a child's right to be free from harm while in state foster care is violated.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:07 CV 1852

[Filed October 6, 2008]

JIANNA MOORE, et al.,	)
	)
Plaintiffs,	)
	)
vs.	)
	)
LAKE COUNTY DEPARTMENT OF JOB AND FAMILY SERVICES, et al.,	)
	)
Defendants.	)
	)

JUDGE DONALD C. NUGENT

MEMORANDUM OPINION

This matter is before the Court on the Motion of Defendants Lake County Department of Job and Family Services, Matthew Battiato, Art Iacofano, Teresa Palm, Melanie Hale, Roberta Barb, Erin Whipple, Melissa Flick, Emily Hazel and Jaime Lette for Summary Judgment. (ECF #34). For the reasons that follow, Defendants' Motion for Summary

Judgment is granted as to Plaintiffs' federal claim and Plaintiffs' remaining state law claims are remanded to state court.

PROCEDURAL AND FACTUAL BACKGROUND[1]

This action was filed in the Lake County Court of Common Pleas by Plaintiff Jianna Moore, a minor, by her next friend and legal guardian, Danielle Moore and Frederick Waterwash, Jianna's birth parents against the County of Lake, Ohio aka Lake County Department of Job and Family Services ("LCDJFS") and its employees or agents Matthew Battiato, Art Iacofano, Teresa Palm, Melanie Hale, Robert Rabb, Erin Whipple, Melissa Flick, Emily Hazel and Jaime Lette. Plaintiffs also named John Does 1-5 as additional defendants.[2]

This case arises from the placement of newborn Jianna Moore in foster care. The Lake County Juvenile Court granted emergency temporary custody of Jianna Moore to LCDJFS on December 12, 2004. Thereafter, LCDJFS placed Jianna Moore with licensed foster parents, Raymond and Lisa Knapp. Subsequently, while in the care of Mr. and Mrs. Knapp, Jianna

---

[1] The factual summary is based upon the parties' statements of fact. Those material facts that are controverted and supported by deposition testimony, affidavit, or other evidence are stated in the light most favorable to the non-moving party.

[2] None of the John Does have ever been identified by Plaintiffs and have not been served. As such, the John Doe defendants are dismissed pursuant to Fed. R. Civ. P. 4(m).

suffered injuries consistent with shaken baby syndrome.

Plaintiffs' Second Amended Complaint alleges one federal claim, violation of 42 U.S.C. § 1983 in that Defendants, as state actors, violated the Due Process clause of the Fourteenth Amendment of the United States Constitution by taking custody of Jianna Moore and placing her in a foster care home thereby creating a special relationship between the state and Jianna and imposing a duty on the state actors to protect, supervise and care for the minor child in the foster home. (Complaint ¶¶ 25-26) Plaintiff alleges that Defendants failed to adequately investigate, approve, train and/or monitor the foster care parents who caused severe injury to Jianna Moore thus resulting in the deprivation of the civil rights of Jianna Moore as guaranteed by the United States and Ohio Constitutions. (Complaint ¶28) Plaintiffs also asserted several state claims: Reckless Placement, Failure to Train, Failure to Monitor, Negligent/Reckless Torts (Count One); Negligent/Reckless conduct (Count Two); Loss of Consortium (Count Three); Release of Confidential Records/Information; R.C. 5153.17; O.A.C. 5101:22-34 (Count Four); and Declaratory Judgment; Constitutionality of R.C. 2744, et seq. (Count Five) Defendants removed this action to this Court on the basis of Plaintiffs' § 1983 claim.

In 2002, Raymond and Lisa Knapp went to LCDJFS and began the process to adopt a child. At some point in this process it became apparent to the Knapps that adopting a child would be difficult due to the limited number of children available for adoption in the age range they desired so they decided to seek licensure as foster parents. In accordance with the

requirements of Ohio law and the regulations of the Ohio Department of Job and Family Services, LCDJFS conducted criminal and background checks, checked personal and employment references, and examined medical evaluations and financial statements of the Knapps.[3] The Knapps attended twenty four hours of pre-service training consisting of eleven classes. The curriculum is mandated by the Ohio Department of Job and Family Services. The Department of Job and Family Services, in accordance with Revised Code Chapter 5103, issued a license to operate a foster home to the Knapps, for the term from September 15, 2003 through September 15, 2005. The Knapps were assigned to a LCDFJS social worker and were required to undergo a home study. The Knapps were licensed for placement of two children of either sex between the ages of zero and three.

On October 24, 2003, both Raymond and Lisa Knapp completed a Foster Parent Training Needs Assessment which asks each prospective foster parent to score themselves in different sections with respect to the level of importance of the skill to the role of a foster parent and the foster parent's level of skill for each section. The possible scores for level of importance are 3 indicating very important to the job; 2 indicating moderately important to the job; 1 indicating minor part of the job and 0 indicating not

---

[3] In accordance with Ohio law and the regulations of the Ohio Department of Job and Family Services, LCDJFS only obtains references from prospective foster parents' current employers and thus did not request Raymond Knapp's employment records from previous employers. At one such employer, Malish Brush, Mr. Knapp was required to undergo anger management training and was ultimately terminated for anger-related issues.

part of the job. The possible scores for level of skill are 3 indicating needs considerable development; 2 indicating needs some development; 1 indicating able to meet job expectations; and 0 indicating exceptional ability. With respect to the Infant Care Section of the Assessment, both Knapps gave infant care a 3 for level of importance and gave themselves a 2 for level of skill, indicating their belief that infant care was very important to their role as a foster parent and that their infant care skills needed some development.

Thereafter, the Knapps continued to attend ongoing training sessions administered by LCDJFS and approved by the Ohio Department of Job and Family Services. In their first year of licensure the Knapps received twenty hours of ongoing training consisting of six classes on various topics. The Knapps' attendance at each of the training sessions and their completion of the mandatory twenty hours of training was certified by the Ohio Department of Job and Family Services. None of the classes attended by the Knapps in their first year of licensure concerned infant care training.

The Knapps completed the Foster Parent Training Needs Assessment again in September 2004. While they indicated higher levels of skill in certain categories from the previous year, both Raymond and Lisa Knapp indicated that their skill level for infant care was a 2 and that infant care was a 3–very important to the job. Based upon the Knapps' self assessments, LCDJFS created a plan for ongoing training to be completed by the Knapps which would include infant care. Under Ohio law and the Ohio Department of Job and Family Services regulations, the Knapps were required to comply with their ongoing training plan within two years (by September

15, 2005) to obtain recertification and licensure as foster care providers.

Jianna Moore was born on December 9, 2004 and the Lake County Juvenile Court granted emergency temporary custody of Jianna to LCDJFS on or about December 12, 2004. Immediately following that decision, Ms. Whipple of LCDJFS took Jianna to the Knapps and placed her there. At that time both Knapps worked Monday through Friday, Lisa on the day shift and Raymond on third shift. On December 17, 2004, Danielle Moore was granted limited visitation with her daughter Jianna. Initially, Lisa Knapp was upset or irritable about the visitation and visitation scheduling, especially over the holidays. However, Ms. Flick, the LCDJFS employee who conducted training with the Knapps, discussed the problems with Lisa Knapp and determined that Mrs. Knapp was ultimately agreeable to visitation and understood that the goal of this placement was reunification of Jianna with her biological mother. Throughout the course of Jianna's placement with the Knapps, Ms. Whipple, under the supervision of LCDJFS supervisor Melanie Hale, conducted regular visits to the Knapps' home to monitor and ensure the safety and well-being of Jianna. Ms. Whipple saw Jianna on a weekly basis at the regular supervised visits with her mother, Danielle Moore, and conducted telephone conversations with the Knapps twice per week. Neither Ms. Whipple nor Ms. Hale observed anything to give them concern about the safety or well being of Jianna or the ability of the Knapps to care for her.

Jianna Moore suffered injuries consistent with "shaken baby syndrome" while in the custody of

Raymond and Lisa Knapp on February 3, 2005. 911 was called and Jianna was taken to Lake East Hospital and then transferred to Rainbow Babies and Children's Hospital for treatment of her injuries. LCDJFS reported the incident to the Ohio Department of Job and Family Services. The Mentor Police Department and LCDJFS conducted investigations into the injuries sustained by Jianna. Both LCDJFS and Mentor Police Detective Colleen Petro determined that the injuries were the result of physical abuse. It was Detective Petro's opinion that Lisa Knapp was responsible for causing the injuries to Jianna, however, because it could not be proven beyond a reasonable doubt whether Lisa or Raymond Knapp abused Jianna, no criminal charges were brought against them. LCDJFS entered a "substantiated physical abuse" finding regarding Mrs. Knapp and a finding of "unsubstantiated physical abuse" regarding Mr. Knapp. While the Ohio Department of Jobs and Family Services apparently did not immediately revoke the Knapps' foster home license, LCDJFS placed the Knapps on hold and no longer considered their home for adoptive or foster placement. The Knapps foster case license and adoption home study expired on September 15, 2005 and they were notified by letter that their foster care and adoption cases were closed with LCDJFS.

Defendants now move for summary judgment on all of Plaintiffs' claims.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where the court is satisfied "that there is no genuine issue as to any material fact and that the moving party is entitled to

a judgment as a matter of law." FED. R. CIV. P. 56(c). The burden of showing the absence of any such "genuine issue" rests with the moving party:

> [A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions answers to interrogatories, and admissions on file, together with affidavits, if any,' which it believes demonstrates the absence of a genuine issue of material fact.

Celotex v. Catrett, 477 U.S. 317, 323 (1986) (Citing FED. R. CIV. P. 56(c)). A fact is "material" only if its resolution will affect the outcome of the lawsuit. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). Determination of whether a factual issue is "genuine" requires consideration of the applicable evidentiary standards. The court will view the summary judgment motion "in the light most favorable to the party opposing the motion." *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962), *see also U.S. v. Hodges X-Ray, Inc.*, 759 F.2d 557, 562 (6th Cir. 1985).

Summary judgment should be granted if a party who bears the burden of proof at trial does not establish an essential element of their case. *Tolton v. American Biodyne, Inc.*, 48 F.3d 937, 941 (6th Cir. 1995) (citing *Celotex*, 477 U.S. at 322). Accordingly, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Copeland v. Machulis*, 57 F.3d 476, 478 (6th Cir. 1995) (quoting *Anderson*, at 248-49 (1986)). Moreover, if the evidence

presented is "merely colorable" and not "significantly probative," the court may decide the legal issue and grant summary judgment. *Anderson*, 477 U.S. at 249-50 (citation omitted). In most civil cases involving summary judgment, the court must decide "whether reasonable jurors could find by a preponderance of the evidence that the [non-moving party] is entitled to a verdict." *Id.* at 252. However, if the non-moving party faces a heightened burden of proof, such as clear and convincing evidence, it must show that it can produce evidence which, if believed, will meet the higher standard. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989).

Once the moving party has satisfied its burden of proof, the burden then shifts to the nonmover. The nonmoving party may not simply rely on its pleadings, but must "produce evidence that results in a conflict of material fact to be solved by a jury." *Cox v. Kentucky Department of Transportation*, 53 F.3d 146, 149 (6th Cir. 1995). The text of FED. R. CIV. P. 56(e) states:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

Id. The Federal Rules identify the penalty for the lack of such a response by the nonmoving party as an automatic grant of summary judgment, where otherwise appropriate.

Though parties must produce evidence in support of and in opposition to a motion for summary judgment, not all types of evidence are permissible. The Sixth Circuit has concurred that, "'it is well settled that only admissible evidence may be considered by the trial court in ruling on a motion for summary judgment.'" *Wiley v. U.S.*, 20 F.3d 222 (6th Cir. 1994) (quoting *Beyene v. Coleman Sec. Servs., Inc.*, 854 F.2d 1179, 1181 (9th Cir. 1988)). FED. R. CIV. P. 56(e) also has certain, more specific requirements:

> [it] requires that affidavits used for summary judgment purposes be made on the basis of personal knowledge, set forth admissible evidence, and show that the affiant is competent to testify. Rule 56(e) further requires the party to attach sworn or certified copies to all documents referred to in the affidavit. Furthermore, hearsay evidence cannot be considered on a motion for summary judgment.

Wiley, at 225-26 (citations omitted). However, evidence not meeting this standard may be considered by the district court unless the opposing party affirmatively raises the issue of the defect. The burden is on the opposing party to object to the improper evidence; failure to object constitutes a waiver.

> If a party fails to object before the district court to the affidavits or evidentiary materials submitted by the other party in support of its position on summary judgment, any objections to the district court's consideration of such materials are deemed to have been waived, and [the Sixth Circuit] will review such objections only to avoid a gross miscarriage of justice.

Id. at 226 (citations omitted).

As a general matter, the district judge considering a motion for summary judgment is to examine "[o]nly disputes over facts that might affect the outcome of the suit under governing law." *Anderson*, 477 U.S. at 248. The court will not consider non-material facts, nor will it weigh material evidence to determine the truth of the matter. *Id.* at 249. The judge's sole function is to determine whether there is a genuine factual issue for trial; this does not exist unless "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Id.*

In sum, proper summary judgment analysis entails:

> the threshold inquiry of determining whether there is the need for a trial -- whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

Anderson, 477 U.S. at 250.

ANALYSIS

In order to establish liability under § 1983 against state officials, a plaintiff must show that the officials, acting under color of state law, caused the deprivation of a federal right. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (citing *Monroe v. Pape*, 365 U.S. 167 (1961)). In other words, the terms of § 1983 demand only two allegations: (1) that a person deprived the plaintiff of a federal right, constitutional or statutory; and (2) that the person acted under color of state law

when depriving the plaintiff of the federal right. *See Searcy v. City of Dayton*, 38 F.3d 282, 286 (6th Cir. 1994) (citing *Flagg Bros. v. Brooks*, 436 U.S. 149, 155 (1978)); *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). If either element is missing, then a § 1983 claim has not been pleaded. *See Christy v. Randlett*, 932 F.2d 502, 504 (6th Cir. 1991).

Furthermore, when a § 1983 claim is alleged, the defense of qualified immunity is available to "government officials performing discretionary functions . . . insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Whether a government official may be held liable for an allegedly unlawful action "generally turns on the objective reasonableness of the action, assessed in light of the legal rules that were clearly established at the time [that the action] was taken." *Veney v. Hogan*, 70 F.3d 917, 920 (6th Cir. 1995) (quoting *Anderson v. Creighton*, 483 U.S. 635, 639 (1987)). The defendant bears the burden of pleading the defense, but the plaintiff must show that the defendant is not entitled to qualified immunity. *Blake v. Wright*, 179 F.3d 1003, 1007 (6th Cir.1999) citing *Wegener v. Covington*, 933 F.2d 390, 392 (6th Cir.1991). The determination of whether an official is entitled to qualified immunity is a question of law for the district court. *See O'Brien v. City of Grand Rapids*, 23 F.3d 990 (6th Cir. 1994) (citing *Poe v. Haydon*, 853 F.2d 418 (1989)).

A. Qualified Immunity

Defendant LCDJFS employees assert that they are entitled to qualified immunity for Plaintiffs' § 1983

claim.[4] The Court must first determine if Plaintiffs had a clearly established constitutional right and if so, whether Defendants' conduct violated that right. *Lintz v. Skipski*, 25 F.3d 304, 305 (6th Cir. 1994). It is clearly established in the Sixth Circuit that "due process extends the right to be free from the infliction of unnecessary harm to children in state-regulated foster homes." *Id*, quoting *Meador v. Cabinet for Human Resources*, 902 F.2d 474, 476 (6th Cir.), *cert denied*, 498 U.S. 867, 111 S.Ct. 182, 112 L.Ed.2d 145 (1990).

The next question is whether the conduct of the LCDJFS employees violated Jianna's clearly established constitutional right. The Sixth Circuit has set the standard of conduct to be applied to state actors in foster care cases such as this. Analogizing the state's role in placing children in foster homes to placing people in mental institutions and prisons, the Court determined that state actors are liable if it is established that they have acted with "deliberate

---

[4] The employees of LCDJFS named as defendants are: Matthew Battiato, LCDJFS' present Director, became Director on August 7, 2006, Art Iacofano, LCDJFS's former Director, Melanie Hale, a Supervisor who performed the investigation on the part of LCDJFS after Jianna was injured; Erin Whipple, a social worker assigned to the Moore case who was responsible for placing Jianna in the Knapps' foster home; Melissa Flick was involved in the foster parent training for Lisa and Raymond Knapp and the placement of Jianna with them; Teresa Palm is Melanie Hale's Supervisor; Roberta Barb recently retired from LCDJFS but was most recently the Children Services Administrator; Jamie Lette became a Supervisor in August 2005 and as a social worker before that, had no connection with the Jianna or her placement; and Emily Hazel, a caseworker whose first involvement with the Moore family began in March 2005, after Jianna was injured.

indifference" to the plight of the foster child. *Lintz*, 25 F.3d at 305.[5]

In *Lintz*, the Sixth Circuit affirmed a district court's order granting summary judgment to the defendant social worker Ms. Skipski on the basis that the defendant was entitled to qualified immunity on plaintiff's § 1983 claim. The plaintiffs alleged that three children in a state-licensed foster home were sexually abused by the foster parents' teenage son Dale over a number of years between May 1987 and November 1990. The issue before the Sixth Circuit that is relevant to the case at bar is the analysis of whether the social worker's actions --after the plaintiffs' due process right to be free from the infliction of unnecessary harm in a foster home became clearly established in May 1990 --constituted "deliberate indifference."

The *Linzt* plaintiffs asserted that signs of sexual abuse began to appear in the children before October 1990–the children acted out sexually on occasions by touching themselves or each other; the therapist the family was seeing noted that in September 1988 the children told the foster mother that Dale was hurting them although no mention was made of sexual misconduct; one of the boys was disciplined at school in March 1990 for kissing and touching a girl and did not understand that his conduct was inappropriate. All

---

[5] While the Court is sympathetic to Plaintiffs' contention that foster children should be entitled to a higher standard of care than prisoners such as a "professional judgment" standard, this Court is bound by the decision of the Sixth Circuit holding that the standard of care in foster care cases in this Circuit is "deliberate indifference." *Linzt*, 25 F.3d at 305.

of these instances were discussed with the therapist who reported them to the Ms. Skipski. Plaintiffs also noted that the social worker should have been on notice of possible abuse in the foster home because the foster parents' older son Robert had pleaded guilty in 1984 to sexually assaulting a five year old girl even though Robert did not live at the home while plaintiffs resided there and he was not involved in any of the allegations of abuse involving these children.

The first specific allegations of sexual abuse did not occur until October 1990. On October 2, the foster mother overheard two of the children in bed talking about pulling each other's pants down, which she reported. On October 9, 1990, one of the children told the therapist that he had oral sex with Dale after Dale promised to give him $2 and to let him play Nintendo. At this point Ms. Skipski began an investigation. She met with the therapist and the children and with the foster parents to discuss the issue. She and the foster parents set up safeguards to ensure that the children would be fully supervised so that no further abuse could occur while Ms. Skipski worked to locate a new foster home which could accommodate all three siblings. The children were moved to a new foster home within a month. The Sixth Circuit found that in these circumstances Ms. Skipski's actions after May 1990 were not "sufficiently unreasonable to constitute 'deliberate indifference.'" *Lintz*, 25 F.3d at 306. While the "whole affair might have been better handled from the beginning, ... that is not the issue ... [t]here must be 'deliberate indifference,'" and there was none here. *Id.* at 307.

Plaintiffs assert that LCDJFS and its employees were deliberately indifferent to the safety and well

being of Jianna Moore by placing her into Raymond and Lisa Knapp's foster home because the foster parents worked different shifts; Mr. Knapp had a history of anger issues; neither foster parent had infant care training or prior experience in raising an infant and both indicated on the self assessments that they needed additional development of infant care skills; and the Knapps were more interested in adoption than in foster care.

There is no allegation that LCDJFS failed to follow Ohio law or the regulations of the Ohio Department of Job and Family Services in evaluating the Knapps' application to be foster parents or adoptive parents. LCDJFS conducted criminal record and background checks, checked personnel and employment references, examined medical evaluations and the financial statements of the Knapps. LCDJFS obtained medical statements from the Knapps' physician which indicated that neither Raymond nor Lisa Knapp suffered from any illnesses, disorders, or behavioral or emotional problems that would be detrimental to a foster child placed in their home. The Knapps' physician indicated in the medical statements that both Raymond and Lisa Knapp made "excellent candidates" as foster parents.

Moreover, like many working couples the Knapps had to juggle work with child care. The fact that they worked different shifts allowed them to care for Jianna without outside childcare. Ms. Whipple, the social worker assigned to the Knapps, was aware of their work schedules and made at least three visits to the Knapps' home during the eight weeks that Jianna was in their home. She conducted telephone conversations with the Knapps twice a week. She did not observe any

significant problem relating to the Knapps' work schedules.

While both Knapps indicated on their self assessments that they desired additional training to improve their infant care skills, they did not indicate that they were unable to meet the job expectations of caring for an infant. LCDJFS employee Melissa Flick testified that it is appropriate and typical for new foster parents like the Knapps to indicate a need for some development in these areas. Based on the Knapps' self assessments, LCDJFS created a plan for ongoing training to be completed by the Knapps within two years to obtain re-certification and licensure as foster care providers. The Knapps were not out of compliance with their ongoing training plan or with any applicable law or regulation related to their licensure when Jianna sustained her injuries within eight weeks of being in their care.

Finally, the fact that the Knapps wanted to adopt does not indicate that they would be more likely to hurt a foster child. While there was some tension regarding visitation with the birth mother at first, particularly as it was around the holidays, Ms. Flick testified that the Knapps came to understand and accept that the ultimate goal of foster care is reunification of the child with his or her biological parents, if possible. Moreover, Mrs. Knapp stated that she understood that the plan in this case was to reunite Jianna with her biological family. Based upon their conversations, Lisa Knapp expressly agreed to work with LCDJFS to do whatever was necessary to facilitate the foster care plan for Jianna.

Overall, the LCDJFS social worker and supervisors worked diligently to monitor the Knapps and Jianna's well-being. Through several visits to the home, twice weekly telephone conversations with the Knapps, visiting with Jianna weekly during her visitation with her biological mother and grandmother, social worker Erin Whipple never observed anything which caused concern for Jianna's safety or well-being. Based upon this record the Defendants' actions were reasonable and did not constitute "deliberate indifference" to Jianna's safety and well-being. Accordingly, the Court finds that the individual defendants, specifically Teresa Palm, Melanie Hale, Erin Whipple and Melissa Flick, are entitled to qualified immunity.[6]

B. § 1983 Claim

Based upon the review of the evidence with respect to the issue of qualified immunity, the Court further finds that the Defendants are entitled to summary judgment on Plaintiffs' §1983 claim. LCDJFS followed Ohio law and the regulations of the Ohio Department of Jobs and Family Services in investigating, reviewing and training the Knapps as foster parents. Further, LCDJFS complied with all applicable laws and regulations when they placed Jianna in the Knapps

---

[6] Plaintiffs have made no specific allegations against some of the individual defendants sufficient to support a claim under § 1983. These defendants, who appear not to have been involved with the interviewing/training or licensing of the Knapps as foster parents or the placement or monitoring of Jianna in the Knapps' foster home or in any other way involved with the Moores or the Knapps prior to Jianna's injury, include Matthew Battiato, Art Iacofano, Roberta Barb, Emily Hazel, and Jamie Lette. As such, Plaintiffs' § 1983 claim is dismissed against these defendants.

state-licensed foster home. While there were some issues at first regarding visitation with the birth mother and the scheduling of the visitation, the LCDJFS social workers and Supervisors closely monitored the situation, talked at length with Mrs. Knapp and Mr. Knapp and ultimately observed nothing that caused them concern for Jianna's safety and well-being. There is no evidence that the LCDJFS employees were aware of any facts from which an inference could be drawn that a substantial risk of serious harm to Jianna existed. The actions of the LCDJFS employees were not so unreasonable as to constitute deliberate indifference to the safety of Jianna Moore. As such, the LCDJFS employees are entitled to judgment as a matter of law on Plaintiffs' §1983 claim.

Because there was no constitutional violation by the LCDJFS employees, there can be no liability imposed upon LCDJFS based upon a theory that LCDJFS is legally responsible for its employees' actions. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986). A governmental entity is liable as an entity under § 1983 "only when the government itself has committed the constitutional violation, not when the violation was committed by its employees." *Feliciano v. City of Cleveland*, 988 F.2d 649, 653 (6th Cir. 1993) *citing: Pembaur v. City of Cincinnati*, 475 U.S. 469, 478-79, 106 S.Ct. 1292, 1297-98 (1985). "Congress did not intend municipalities to be held liable [under §1983] unless action pursuant to official municipal policy of some nature caused a constitutional tort." *Monell v. Dept. of Social Services*, 436 U.S. 658, 691 (1978). Thus, it is only " when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly

be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983." *Id.* at 694. In other words, the official policy must be the "moving force of the constitutional violation." *See id.*

Plaintiffs assert that LCDJFS is liable on their §1983 claim because Jianna's injuries were the result of the lack of an LCDJFS policy to ensure that foster parents who indicate that they are unable to meet the job expectations of caring for an infant do not have an infant placed in their care. As discussed above, however, the self assessment forms completed by the Knapps do not indicate that they were unable to care for an infant. Rather, the assessment forms are tools used by LCDJFS to structure mandatory ongoing training. In any event, it is the policy of LCDJFS to place children in foster homes only after they are properly licensed by the State of Ohio. The Knapps' foster home was properly licensed by the State of Ohio. Further, state law requires LCDJFS to develop and implement an ongoing training plan for new foster parents based upon the need identified in the parents' self assessment. Indeed, making licensed foster parents' self evaluations a basis to deny placement may in fact interfere with the efficacy of structuring mandatory ongoing training. In any event, LCDJFS complied with all of the state laws and regulations in this instance and there is no evidence that LCDJFS' failure to institute a policy to base placement decisions based upon foster parents' self assessments caused any constitutional injury in this case. Accordingly, LCDJFS is entitled to summary judgment on Plaintiffs' §1983 claim.

CONCLUSION

Having concluded that neither LCDFJS or its employees acted with deliberate indifference to the safety or well-being of Jianna Moore, the Court finds that Defendants are entitled to summary judgment on Plaintiffs' claim under §1983 for deprivation of Jianna's Fourteenth Amendment right to due process. The Court also finds that the LCDFJS employees are entitled to qualified immunity on Plaintiffs' §1983 claim. Defendants' Motion for Summary Judgment on Plaintiffs' §1983 claim is **GRANTED**, and that claim is **DISMISSED**. As Plaintiffs' §1983 claim is the only claim in this matter over which this Court had original jurisdiction, the Court exercises its discretion, pursuant to 28 U.S.C. §1367(c)(3), to decline to retain supplemental jurisdiction over the remaining state law claims against all defendants in this case. The Court, therefore, **REMANDS** this matter to the Court of Common Pleas for Lake County, Ohio, where it was originally filed. This case is **DISMISSED**.

IT IS SO ORDERED.

/s/ Donald C. Nugent
DONALD C. NUGENT
UNITED STATES DISTRICT JUDGE

DATED: October 6, 2008

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:07 CV 1852

[Filed October 6, 2008]

JIANNA MOORE, et al.,	)
	)
Plaintiffs,	)
	)
vs.	)
	)
LAKE COUNTY DEPARTMENT OF JOB AND FAMILY SERVICES, et al.,	)
	)
Defendants.	)

JUDGE DONALD C. NUGENT

JUDGMENT

Pursuant to a Memorandum Opinion of this Court, Defendants' Motion for Summary Judgment is **GRANTED** as to Plaintiffs' §1983 claim, the only federal claim in this action. Further, Plaintiffs remaining state law claims are **REMANDED** to the Court of Common Pleas for Lake County, Ohio where they were originally filed. This case is **DISMISSED**.

IT IS SO ORDERED.

/s/Donald C. Nugent
DONALD C. NUGENT
UNITED STATES DISTRICT JUDGE

DATED: October 6, 2008

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 08-4565

[March 30, 2010]
[Original version filed March 26, 2010]

JIANNA MOORE, ET AL.,	)
	)
Plaintiffs-Appellants,	)
	)
v.	)
	)
LAKE COUNTY DEPARTMENT OF JOB AND FAMILY SERVICES, ET AL.,	)
	)
Defendants-Appellees.	)
	)

AMENDED
O R D E R

BEFORE: BATCHELDER, Chief Judge; GRIFFIN, Circuit Judge; and TARNOW,* District Judge.

* Hon. Arthur J. Tarnow, United States District Judge for the Eastern District of Michigan, sitting by designation.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green

Leonard Green, Clerk

Supreme Court, U.S.
FILED

No. 09-1568

IN THE

Supreme Court of the United States

JIANNA MOORE, *et al.*,

Petitioners,

v.

LAKE COUNTY DEPARTMENT OF JOB AND FAMILY SERVICES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

JOHN T. MCLANDRICH
Counsel of Record
FRANK H. SCIALDONE
MAZANEC, RASKIN, RYDER & KELLER CO., L.P.A.
100 FRANKLIN'S ROW
34305 SOLON ROAD
CLEVELAND, OH 44139
(440) 248-7906
jmclandrich@mrrklaw.com

Counsel for Respondents Lake County Department of Job and Family Services, Matthew Battiato, Art Iacofano, Teresa Palm, Melanie Hale, Roberta Barb, Erin Whipple, Melissa Flick, Emily Hazel and Jaime Lette

231980

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED FOR REVIEW

Did the Petitioners demonstrate a "compelling reason" to grant this Petition when there is no meaningful difference between the deliberate indifference and professional judgment standards and when no substantial conflict exists?

Did the Petitioners demonstrate a "compelling reason" to grant this Petition when the sixth circuit properly applied the deliberate indifference standard to determine the liability of a county employee who places a child in the care of state-licensed foster parents?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW ...	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iv
INTRODUCTION	1
STATEMENT OF THE CASE AND FACTS ..	2
A. Procedural Background	2
B. Background Facts	4
1. The State of Ohio licensed foster parents Raymond and Lisa Knapp under the requirements dictated exclusively by Ohio law.	4
2. An Ohio Juvenile Court ordered LCDJFS to take emergency temporary custody of Jianna Moore, and LCDFJFS placed Jianna Moore with licensed foster parents, Raymond and Lisa Knapp.	6
3. On February 3, 2005, Jianna Moore suffered injuries while in the custody of Raymond and Lisa Knapp.	8

Contents

	Page
REASONS FOR DENYING THE PETITION ...	9
A. No substantial conflict exists.	9
B. Despite Petitioners' request for a negligence-based test, negligence cannot be the standard for a Section 1983 claim.	13
C. Petitioner's claim is otherwise barred because they have never identified any individual defendant that acted even negligently and have otherwise waived any claim against the public entity.	15
CONCLUSION	18

TABLE OF CITED AUTHORITIES

Cases — *Page*

County of Sacramento v. Lewis,
523 U.S. 833 (1998) 12, 13

Daniels v. Williams,
474 U.S. 332, 106 S.Ct. 665 13

Doe v. New York City Dep't of Social Servs.,
649 F.2d 134 (2nd Cir. 1990) 10

Doe ex rel. Johnson v. South Carolina Dept. of Social Services,
597 F.3d 163 (4th Cir. 2010) 10

Dorsey v. Barber,
517 F.3d 389 (6th Cir. 2008) 16

Farmer v. Brennan,
511 U.S. 838 (1994) 10, 11

Garner v. Memphis Police Dep't,
8 F.3d 358 (6th Cir. 1993) 17

Green v. Post,
574 F.3d 1294 (10th Cir. 2009) 12

Hernandez ex rel. Hernandez,
303 F.3d 872 (5th Cir. 2004) 10

Cited Authorities

Page

J.H. ex rel. Higgin v. Johnson,
346 F3d 788 (7th Cir. 2003) 10

J.K. v. Gloria,
593 F3d 73 (1st Cir. 2010) 10

James ex rel. James v. Friend,
458 F3d 726 (8th Cir. 2006) 10

Lewis v. N.M. Dep't of Human Servs.,
959 F2d 883 (10th Cir. 1992) 1, 10

Lintz v. Skipski,
25 F3d 304 (6th Cir. 1994) 10

Monell v. Dep't of Soc. Servs.,
436 U.S. 658 (1978) 15, 17

Nicini v. Morra,
212 F3d 798 (2nd Cir. 2000) 10

Phillips v. County of Allegheny,
515 F3d 224 (3rd Cir. 2008) 12

Ray v. Foltz,
370 F3d 1079 (11th Cir. 2004) 10

Youngberg v. Romeo,
457 U.S. 307 (1982) 14

Cited Authorities

Page

United States Constitution

Fourteenth Amendment 13

Statutes

Ohio Revised Code Chapter 5103 5

42 U.S.C. § 1983 ..... *passim*

Rules

Sup. Ct. R. 10 ..... 1, 13

INTRODUCTION

The Petitioners have not articulated a "compelling" reason for this Court's discretionary review. Sup. Ct. R. 10. At the heart of their request, Petitioners argue that the sixth circuit erred when it failed to adopt the professional judgment standard. But, the deliberate indifference standard is well established and routinely applied in situations involving the liability of state actors who place children in foster care. Circuit courts across the country consistently apply the deliberate-indifference standard in the foster care context to determine whether a state actor is liable under Section 1983. There is nothing novel or controversial about applying this standard.

While Petitioners argue that a substantial conflict between the circuits exists, that conflict is illusory and insubstantial. That is because there is no meaningful distinction between the professional judgment and deliberate indifference standards. Therefore, there cannot be a substantial conflict among the circuit courts and state supreme courts. In fact, the Petitioners point to the Tenth Circuit as posing a circuit conflict. But, that circuit found that as "applied to the foster care setting we doubt there is much difference in the two standards." *Lewis v. N.M. Dep't of Human Servs.*, 959 F.2d 883, 894 (10th Cir. 1992). Moreover, the deliberate indifference standard is "flexible" and "context dependent." That standard easily accounts for different factual situations such as the one at bar. Interjecting new terminology for the deliberate indifference standard, as Petitioners advocate, adds nothing but the potential for confusion and disruption to the existing case law.

Finally, the Respondents cannot be held liable under any standard. In the present case, the lower courts properly determined that the Lake County Department of Job and Family Services and its employees complied with all of the state laws and regulations. LCDJFS social workers and supervisors worked diligently to monitor the foster parents and the foster child's well-being. Through several visits to the home, twice weekly telephone conversations with the foster parents, visiting with the child weekly during her visitation with her biological mother and grandmother, LCDJFS employees never observed anything which caused concern for the child's safety or well-being. There is no evidence that the LCDJFS employees were aware of any facts from which an inference could be drawn that a risk of serious harm to the child existed.

Petitioners failed to demonstrate that there are "compelling reasons" to grant this Petition. This Court should deny this writ.

STATEMENT OF THE CASE AND FACTS

A. Procedural Background

This action was brought in the United States District Court for the Northern District of Ohio, invoking 42 U.S.C. § 1983 and claiming a violation of substantive due process rights.[1] This case arises out of the foster

[1] The Plaintiffs also alleged state law claims, which the district court remanded to the state court after dismissing with prejudice the federal claims. On March 30, 2009, the Court of (Cont'd)

care of Jianna Moore. While in the custody of State-licensed foster parents Raymond and Lisa Knapp, Jianna suffered injuries consistent with shaken baby syndrome.

The Petitioners sued the Respondents Lake County Department of Job and Family Services ("LCDJFS") and several of its employees, some of which had nothing to do with Jianna's case. Petitioners contended that the unspecified "Defendants" deprived Jianna Moore of her constitutional right to substantive due process by allegedly failing to protect her from the violent acts of third parties and by allegedly failing to adequately investigate, approve, train and monitor Raymond and Lisa Knapp.

Because the record was devoid of support for these claims, the Respondents requested that the court grant summary judgment and the parties fully briefed the issue. Applying the straight-forward law of the sixth circuit and after extensive discovery, the district court determined that "there is no evidence that the LCDJFS employees were aware of any facts from which an inference could be drawn that a substantial risk of serious harm to Jianna existed." (Pet. at Apx. "B" 25a.) The district court held that "LCDJFS complied with all of the state laws and regulations in this instance and there is no evidence that

(Cont'd)

Common Pleas, Lake County, Ohio, also found no merit to Plaintiffs' state claims. The state court granted summary judgment in the Defendants' favor. *Jianna Moore, etc., v Lake County Dept. of Job and Family Services et al.*, Case No.: 06CV002928, Lake County. A state appellate court affirmed.

LCDJFS' failure to institute a policy . . . caused any constitutional injury in this case." (Pet. at Apx. "B" 25a.) On October 6, 2008, the court granted summary judgment in favor of all Defendants. *Id.*

The sixth circuit, in an unreported decision, affirmed the district court and refused to adopt the professional judgment standard. (Pet. at Apx. "A" 1a.)

B. Background Facts

The Court of Appeals for the Sixth Circuit and the U.S. District Court for the Northern District of Ohio accurately stated the pertinent facts relevant to the Petitioners' claims. (Pet. at Apx. "A" 1a and Apx. "B" 7a.) For this Court's convenience, the Respondents provide the following.

1. The State of Ohio licensed foster parents Raymond and Lisa Knapp under the requirements dictated exclusively by Ohio law.

In 2003, Raymond and Lisa Knapp submitted an application to the Lake County Department of Job and Family Services (LCDJFS) to serve as foster care providers. In accordance with the requirements of Ohio law and the regulations of the Ohio Department of Job and Family Services, LCDJFS conducted criminal record and background checks, checked personal and employment references, and examined medical evaluations and financial statements of the Knapps. Following their application, the Knapps underwent extensive pre service training, the curriculum of which

is mandated by the Ohio Department of Job and Family Services. Specifically, the Knapps took eleven pre-service training classes totaling 24 hours. The Knapps took the following classes: (1) Becoming an Out of Home Care Provider, Part One; (2) Becoming an Out of Home Care Provider, Part Two; (3) Attachment and Effects of Separation and Placement; (4) Effects of Fostering on the Family; (5) Cultural Issues in Placement; (6) The Dynamics of Abuse and Neglect; (7) The Effects of Abuse and Neglect on Child Development; (8) Behavior Management; (9) Behavior Management, Part Two; (10) The Child's Family; and (11) Protocol for Care.

Consistent with Ohio law, as embodied in Ohio Revised Code Chapter 5103, the Ohio Department of Job and Family Services issued a license to operate a foster home to Raymond and Lisa Knapp. Subsequently, the Knapps were assigned to a LCDFJS social worker and required to undergo a home study. Pursuant to the rules and regulations of the Ohio Department of Job and Family Services, the Knapps were licensed for placement of two children between zero and three years of age.

Subsequently, the Knapps underwent ongoing training administered by LCDJFS and approved by the Ohio Department of Job and Family Services. The Knapps received twenty hours of ongoing training during their first year of licensure, from September 15, 2003 to September 15, 2004. Specifically, on November 1, 2003, Mr. and Mrs. Knapp attended a six-hour training session presented by Ms. Flick at the Geauga County Department of Job and Family Services entitled "Love and Logic Parenting." On November 15,

2003 Mr. and Mrs. Knapp took a two-hour class at LCDJFS entitled "Placement Decisions, Foster Parents as Part of the Team." On November 18, 2003, the Knapps took a two-hour training class entitled "Court Procedures," which was presented by an assistant Lake County Prosecutor. On February 21, 2004, the Knapps attended a six-hour training session, entitled "Diversity Training," at the Geauga County Department of Job and Family Services. On March 24, 2004, Mr. and Mrs. Knapp attended a three-hour class at LCDJFS entitled "Caring for Children Who Have Been Sexually Abused." Finally, on August 22, 2004, the Knapps attended a one-hour video training session entitled "Re-education of Foster Adoptive Kids, Prospect for a Healthy Life." The Knapps' attendance at each of these sessions, and their completion of the mandatory twenty hours of training, was certified by the Ohio Department of Job and Family Services.

Pursuant to the requirements dictated by the Ohio Department of Job and Family Services, LCDJFS conducted routine visits to the Knapps' home. The first visit was conducted in November 2003. Subsequent visits took place on a quarterly basis.

2. **An Ohio Juvenile Court ordered LCDJFS to take emergency temporary custody of Jianna Moore, and LCDFJFS placed Jianna Moore with licensed foster parents, Raymond and Lisa Knapp.**

Petitioner Jianna Moore was born on December 9, 2004. Subsequently, LCDJFS initiated proceedings to obtain emergency temporary custody of Jianna Moore

based upon concerns relating to the mental health, possible drug use and parenting skills of Jianna's biological mother, Plaintiff Danielle Moore, as well as the unsafe condition of Danielle Moore's home. On or about December 12, 2004, the Lake County Juvenile Court granted emergency temporary custody of Jianna Moore to LCDJFS. Prior to the hearing, the substitute care unit of LCDJFS considered available options for placement of Jianna Moore and tentatively approved placement with Raymond and Lisa Knapp. Immediately following the Juvenile Court's grant of temporary custody to LCDJFS, Ms. Whipple took Jianna Moore to the Knapps' home and placed her there. Following placement of Jianna Moore with them, the Knapps executed an Individual Child Care Agreement with LCDJFS, in accordance with the rules and regulations of the Ohio Department of Job and Family Services, whereby Mr. and Mrs. Knapp were permitted to receive and review information regarding, and attend all case plan meetings and semi-annual reviews of, Jianna Moore's case. The case plan and semi-annual review necessarily included information regarding Jianna Moore's biological family.

Throughout the course of Jianna Moore's placement with the Knapps, and under the supervision of LCDJFS supervisor Melanie Hale, Ms. Whipple conducted regular visits to the Knapps' home to monitor and ensure the safety and well-being of Jianna Moore. Moreover, Ms. Whipple personally saw Jianna on a weekly basis, and conducted telephone conversations with the Knapps twice per week. Neither Ms. Whipple nor Ms. Hale ever observed anything to give them any concerns about the safety or well-being of Jianna Moore

or the ability of the Knapps to care for her. Likewise, Jianna's biological mother, Plaintiff Danielle Moore, visited Jianna regularly and never observed any signs of physical abuse or injury.

3. On February 3, 2005, Jianna Moore suffered injuries while in the custody of Raymond and Lisa Knapp.

On February 3, 2005, Jianna Moore suffered injuries that were consistent with "shaken baby syndrome." The Mentor Police Department, as well as LCDJFS, conducted investigations into the injuries sustained by Jianna Moore. Both Detective Petro and Ms. Hale concluded that Jianna Moore's injuries were the result of physical abuse sustained while in the custody of Raymond and Lisa Knapp.

The Petitioners sued the employees of LCDJFS named as Respondents in this action including its present Director, Matthew Battiato, and its former Director, Art Iacofano. Mr. Battiato became the Director of Lake County Department of Job and Family Services on August 7, 2006—long after the events which are the subject matter of Petitioners' Complaint. Respondent Melanie Hale is a Supervisor who performed the investigation on the part of LCDJFS after Jianna Moore sustained her alleged injuries. Erin Whipple is a social worker employed by LCDJFS who was assigned to the Moore case and was responsible for placing Jianna in the Knapps' foster home. Respondent Melissa Flick was involved in the foster parent training for Lisa and Ray Knapp and the placement of Jianna Moore with them. Respondent Teresa Palm is Melanie Hale's supervisor.

Respondent Roberta Barb recently retired from LCDJFS, but while employed there was most recently the Children Services Administrator. Respondent Jamie Lette is presently a supervisor but did not assume that position until August of 2005, and while she previously worked as a social worker at LCDJFS, she had nothing to do with Jianna Moore or her placement. Finally, Respondent Emily Hazel is a caseworker but her first involvement with the Moore family began in March of 2005, after the placement and injuries sustained by Jianna Moore.

Despite having asserted claims against the above-mentioned individual employees of LCDJFS, Petitioners have not identified any facts supporting any legal claims against them.

REASONS FOR DENYING THE PETITION

A. No substantial conflict exists.

Petitioners claim there is a substantial conflict between circuits that have adopted one of two competing standards regarding the culpability of state actors who place foster children.

The conflict is illusory and insubstantial.

Circuit courts across the country consistently and routinely apply the deliberate indifference standard to determining whether a state actor is liable under Section 1983 for allegedly failing to meet obligations to the foster children in its care. The Sixth Circuit, like countless other circuits, holds that the "deliberate indifference"

standard applies in a foster-care context. *See, e.g., J.K. v. Gloria*, 593 F3d 73 (1st Cir. 2010); *Doe v. New York City Dep't of Social Servs.*, 649 F2d 134, 141 (2nd Cir. 1990); *Nicini v. Morra*, 212 F3d 798, 811 (3rd Cir. 2000); *Doe ex rel. Johnson v. South Carolina Dept. of Social Services*, 597 F3d 163 (4th Cir. 2010); *Hernandez ex rel Hernandez*, 380 F3d 872 (5th Cir. 2004); *Lintz v. Skipski*, 25 F3d 304, 305 (6th Cir. 1994); *J.H. ex rel. Higgin v. Johnson*, 346 F3d 788 (7th Cir. 2003); *James ex rel. James v. Friend*, 458 F3d 726 (8th Cir. 2006); *Ray v. Foltz*, 370 F3d 1079 (11th Cir. 2004).

Petitioners point to the Tenth Circuit as the "one federal circuit [that] has expressly adopted the professional judgment standard . . . for evaluating a § 1983 cause of action brought by a foster child." (Petitioner's Br. at 22.) The Petitioners fail to note that the Tenth Circuit did not find much difference between the deliberate indifference and the professional judgment standards. *Lewis v. N.M. Dep't of Human Servs.*, 959 F2d 883, 894 (10th Cir. 1992) ("As applied to the foster care setting we doubt there is much difference in the two standards.")

As the Tenth District itself suggests, the professional judgment standard and deliberate indifference standard is tautology. There simply is no real practical difference but for the words used. Both standards occupy virtually the same point on the "culpability" spectrum —with negligence on one end and intentional wrongdoing on the other. In *Farmer v. Brennan*, 511 U.S. 828 (1994), the Court analyzed the level of culpability deliberate indifference entails. 511 U.S. at 836-47. The Court began the analysis by

asserting that reckless disregard does not fully define the level of culpability required for deliberate indifference. *Id.* at 837. The Court considered what it described as "civil law" recklessness—in which the defendant "should have known" or would be "charged with such knowledge"—and "criminal law" recklessness—which essentially entails ignoring a known risk. *Id.* In concluding that "criminal law" recklessness was the appropriate level of culpability for deliberate indifference, the Court required a plaintiff to establish that the defendant "consciously disregarded" a substantial risk of serious harm. *Id.* at 839. With anything less, constitutional liability cannot be imposed. Unless a defendant deliberately fails to learn of a risk, the level of culpability never exceeds the negligence category—even if it is gross negligence.

Under the professional judgment standard, the same conclusion must be reached. "The substantive component of the due process clause protects against only the most egregious, arbitrary governmental conduct—that is, conduct that can be said to 'shock the conscience.'" The "conflict" that Petitioner describes in his Petition is more theoretical than real. No matter what labels are given, the standards are virtually the same. Within the context of investigating suspected child abuse, if a state official "fails to exercise professional judgment," it means he has disregarded the suspicion of abuse. Even if the official was grossly negligent, constitutional liability will not attach under either the professional judgment or deliberate indifference standard. To "fail to exercise professional judgment," the official needs to do so knowingly. An official must "consciously disregard" a suspicion of

abuse. Despite attempts to draw fine lines between the professional judgment and deliberate indifference standards, there is no meaningful difference between them.

This Court has plainly recognized that the deliberate indifference or shocks the conscious standard for substantive due process claims is flexible in that what shocks the conscience in one context would not in another context. The deliberate indifference standard subsumes the purported professional judgment standard. Here, the standard of what shocks the conscience is viewed in the context of foster care placement. "Rules of due process are not . . . subject to mechanical application in unfamiliar territory. Deliberate indifference that shocks in one environment may not be so patently egregious in another[.]" *County of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998). Whether a state actor's conduct shocks the conscience depends on the particular factual circumstances, and cannot be determined by reference to an inflexible standard. *Id.*

Circuit courts of appeal understand that determinations of deliberate indifference and questions of what shocks the conscience are adjudicated under this flexible standard. *See, e.g., Phillips v. County of Allegheny*, 515 F3d 224, 241 (3rd Cir. 2008); *see further e.g., Green v. Post*, 574 F3d 1294, 1302 (10th Cir. 2009). The so-called "professional judgment standard" does not add anything to the deliberate indifference standard, which provides the flexibility to accommodate the present context without injecting uncertainty and confusion into the existing law. Creating new terminology would create confusion in the case law

regarding the standard to apply. And, it would create uncertainty in the voluminous case law that has developed around the deliberate indifference standard in the foster-care context and related contexts.

While Petitioners want to change the standard, there is no legitimate, let alone compelling, reason to do so. And, there is no substantial conflict between the Tenth Circuit and other circuit courts or state courts of last resort.

B. Despite Petitioners' request for a negligence-based test, negligence cannot be the standard for a Section 1983 claim.

At the heart of their request, Petitioners advocate a thinly veiled negligence standard in a vain effort to continue to litigate this case. The Petitioners have not articulated a "compelling" reason for this Court's discretionary review. "A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. This case poses no "compelling reason."

This Court has been clear that "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *County of Sacramento v. Lewis*, 523 U.S. 833, 848 (1998). This Court has expressly held that the Fourteenth Amendment is not a "font of tort law to be superimposed upon whatever systems may already be administered by the States," and in *Daniels v. Williams*, 474 U.S., at 332, 106 S.Ct., at 665, the Court reaffirmed the point that "[o]ur Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down

rules of conduct to regulate liability for injuries that attend living together in society."

Despite the established law or perhaps knowing it, Petitioners try to cut a fine line between negligence and deliberate indifference when they advocate a professional judgment standard. Petitioners' argument is largely based on *Youngberg v. Romeo*, 457 U.S. 307 (1982), which has not generated a substantial conflict during its 28-year history. (Pet. at 30.) Petitioners rely on *Youngberg* to argue that the institutionalization of a mentally handicapped person is tantamount to a foster child in the custody of a third-party foster parent. The differences between these situations are stark, most notably that an institutionalized person is in the custody of the state and the state could extensively monitor that person's confinement 24 hours a day. In the foster care context, that degree of monitoring is impossible. While Petitioners claim that "deliberate indifference" encourages public employees to ignore danger, this claim is unfair and, in this instance, simply untrue. (Pet. at 32.) Here, the Respondents did everything required under Ohio law and Petitioners failed to articulate any reason the Respondents had to believe Jianna would be harmed. Even assuming that there is some substantial difference between the standards—which there is not—the deliberate indifference standard acknowledges the difficult conditions under which state officials operating in the foster care field find themselves, including the inability to constantly monitor, unrealistic caseloads, and inadequate funding.

Ultimately, Petitioners cannot escape that this case is nothing more than a negligence case in which they

cannot even overcome a common-law negligence standard. The facts are undisputed that LCDJFS and its employees complied with all of the state laws and regulations. LCDJFS social workers and supervisors worked diligently to monitor the Knapps and Jianna's well-being. Through several visits to the home, twice weekly telephone conversations with the Knapps, visiting with Jianna weekly during her visitation with her biological mother and grandmother, LCDJFS employees never observed anything which caused concern for Jianna's safety or well-being. There is no evidence that the LCDJFS employees were aware of any facts from which an inference could be drawn that a substantial risk of serious harm to Jianna existed. These facts are undisputed.

C. Petitioner's claim is otherwise barred because they have never identified any individual defendant that acted even negligently and have otherwise waived any claim against the public entity.

While arguing that there is a substantial reason for review, Petitioners fail to explain how the individual Respondents acted unlawfully under *any* standard. Petitioners cannot establish that liability exists against an individual. And, Petitioners waived and cannot otherwise establish *Monell* liability against the entity because there is no underlying constitutional violation.

First, Petitioners do not establish that any individual Respondent did anything unlawful. The law is well established that "Each defendant's liability must be assessed individually, based on his or her own actions,"

not the purported actions of others. *Dorsey v. Barber*, 517 F.3d 389 at fn. 4 (6th Cir. 2008). Petitioners' over-generalized claims against everyone they named in their complaint are insufficient. The employees of LCDJFS named as defendants are: Matthew Battiato, LCDJFS' present Director, became Director on August 7, 2006; Art Iacofano, LCDJFS's former Director; Melanie Hale, a Supervisor who performed the investigation on the part of LCDJFS after Jianna was injured; Erin Whipple, a social worker assigned to the Moore case who was responsible for placing Jianna in the Knapps' foster home; Melissa Flick was involved in the foster parent training for Lisa and Raymond Knapp and the placement of Jianna with them; Teresa Palm is Melanie Hale's Supervisor; Roberta Barb recently retired from LCDJFS but was most recently the Children Services Administrator; Jamie Lette became a Supervisor in August 2005 and as a social worker before that, had no connection with the Jianna or her placement; and Emily Hazel, a caseworker whose first involvement with the Moore family began in March 2005, after Jianna was injured. Petitioners do not state how any of these Respondents were deliberately indifferent, failed to exercise professional judgment, or acted negligently toward Jianna Moore. They simply failed to demonstrate that any of these Respondents were liable "individually, based on his or her own actions." *Dorsey*, *supra*. Petitioners' over-generalized allegations are insufficient to establish liability.

Second, Petitioners cannot establish a claim against the entity, the Lake County Department of Job and Family Services, for no fewer than two reasons. Petitioners waived the argument that LCDJFS "caused"

a constitutional violation because they did not raise the argument or challenge the district court's holding in that regard in the intermediate appellate court. Petitioners abandoned any argument that a policy of the County caused Petitioners' injury within the meaning of *Monell*. The Petitioners failed to demonstrate facts that would establish causation. Furthermore, and independent of the lack of a constitutional violation, the district court correctly determined that **no** LCDJFS policy caused Jianna's injury. (Pet. at Apx. "B" 26a.) The LCDJFS cannot be held liable under 42 U.S.C. § 1983 under a theory of respondeat superior unless the Petitioners prove an injury caused by action taken pursuant to official municipal policy. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978). In sum, the Petitioners failed to 1) identify the policy, 2) connect the policy to the governmental entity, and 3) show that the particular injury was incurred because of the execution of that policy. *See Garner v. Memphis Police Dep't*, 8 F.3d 358, 363-64 (6th Cir.1993)

CONCLUSION

This Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

JOHN T. MCLANDRICH
Counsel of Record
FRANK H. SCIALDONE
MAZANEC, RASKIN, RYDER &
KELLER CO., L.P.A.
100 FRANKLIN'S ROW
34305 SOLON ROAD
CLEVELAND, OH 44139
(440) 248-7906
jmclandrich@mrrklaw.com

Counsel for Respondents
Lake County Department of Job and Family Services, Matthew Battiato, Art Iacofano, Teresa Palm, Melanie Hale, Roberta Barb, Erin Whipple, Melissa Flick, Emily Hazel and Jaime Lette